IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1421

GULF STATES UTILITIES COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,
SAM RAYBURN DAM ELECTRIC COOPERATIVE,
MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION,

Respondents.

PETITION OF GULF STATES UTILITIES COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

B. H. HUGHES
ORGAIN, BELL & TUCKER
4th Floor
Beaumont Savings Building
Beaumont, Texas 77701

Counsel for Petitioner

FIDELITY PRINTING COMPANY, HOUSTON

INDEX

CITATIONS

Cases

Statutes

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Petitioner, Gulf States Utilities Company ("Gulf States"), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, decided July 11, 1975, Petitioner's Motion for Rehearing En Banc and Petition for Rehearing having been overruled January 12, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reported at ..... U.S. App. D.C. at ....., 515 F.2d 998 (1975), is App. A, *infra,* at page A-1.

Judgment of the Court of Appeals is App. B, *infra,* at page B-1. Orders overruling motion for rehearing en banc and petition for rehearing is App. C, *infra,* at page C-1. The order of the Federal Power Commission (FPC) determining the character of the rate contracts is App. D, *infra,* at page D-1; FPC order overruling motion for rehearing filed by Sam Rayburn Dam Electric Cooperative ("Sam Rayburn"), Intervenor in the proceeding before the FPC, is App. E, *infra,* at page E-1; FPC order overruling motion for rehearing filed by Mid-South Electric Cooperative Association ("Mid-South"), Intervenor in the proceeding before the FPC is App. F, *infra,* at page F-1.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered July 11, 1975. Motion for rehearing en banc and petition for rehearing was denied on January 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Does a Court of Appeals have jurisdiction on review of an FPC order to make an initial determination of an adjudicative fact issue?

II. Does a Court of Appeals have equity power to excuse a failure to comply with a statutory prerequisite to its own jurisdiction?

III. Does the *FPC* v. *Sierra Pacific Power Co.* doctrine, which established rigid standards for changing the rate charged for previously contracted sales, apply in a proceeding for review of the rate to be initially charged for newly contracted sales?

STATUTES INVOLVED

Sections 205, 206, 313 of the Federal Power Act, 16 U.S.C. § 824d, 824e, 825l and Sections 554 and 706 of the Administrative Procedures Act, 5 U.S.C. §§ 554 and 706, are set forth in Appendix G, *infra,* at p. G-1.

STATEMENT

In 1964, Gulf States, a public utility, entered into a contract with Sam Rayburn pursuant to which, among other things, Gulf States agreed to supply power to Sam Rayburn's member municipalities and rural electric cooperatives at specified rates (R.pp. 365-535).[1] The contract reserved to the parties various procedures for changing such rates including the following general clause:

> "(c) If a rate increase or decrease should be made applicable to the service rendered by Gulf States to the Sam Dam Coop hereunder by final order or by acceptance for filing by Gulf States of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to such service rendered hereunder from and after the effective date of such rate change."

In its order issued June 14, 1973, the FPC determined as a matter of law that such clause effectively reserved

[1] "R" refers to the printed joint appendix filed in the Court of Appeals in connection with the appeal which resulted in the judgment (App. B, *infra,* at p. B-1) which Gulf States asks this Court to review.

to Gulf States, in conformity with the determination of this Court in *United Gas Pipeline Co.* v. *Memphis Light, Gas and Water Division*,[2] the right unilaterally to seek rate changes.[3] On July 13, 1973, Sam Rayburn filed an application for rehearing (R. pp. 1072-1128). Attached to such application for rehearing were affidavits of certain persons having relationships with Sam Rayburn (R. pp. 1089-1109). This extrinsic material had not previously been submitted and was never subject to any fact-finding procedures whatsoever within the FPC. Under FPC Rules of Practice and Procedure[4] Gulf States was foreclosed from making any answer or response whatsoever to the application for rehearing of Sam Rayburn or to the newly submitted affidavits. Thus Gulf States never even had an opportunity to rebut, explain, cross-examine, or otherwise respond to or test such affidavits. By order issued August 7, 1973, the FPC again, after considering Sam Rayburn's application and affidavits, concluded as a matter of law that its

> "experience in reading such contracts inclines us to the view we held in our June 14 order, that these provisions set out alternative procedures by which the contract rates may be adjusted." (App. E, *infra*, at p. E-6).

On July 11, 1975, a decision was made by the United States Court of Appeals for the District of Columbia reversing such determination of the FPC. (App. A, *infra*,

[2] 358 U.S. 103, 79 S. Ct. 194, 3 L. Ed 2d 153 (1958).

[3] App. D, *infra*, at p. D-4.

[4] Rule § 1.34(d) states:

> "No answers to petitions for rehearing will be entertained by the Commission."

The rule goes on to provide an opportunity for response only if rehearing is granted. No rehearing was granted by the FPC on Sam Rayburn's petition in this case. App. E. *infra*, at p. E-7.

at p. A-17). The decision of the Court of Appeals was expressly grounded upon *its own initial fact determination* as to the intent of the parties based upon the extrinsic material so submitted by Sam Rayburn (App. A, *infra*, at p. A-11 and p. A-17).

In its order of June 14, 1973, the FPC also determined as a matter of law that Gulf States' rate change would apply to most of its power deliveries to Mid-South and expressly so ordered by specific reference to the Mid-South contract (FPC No. 76) (App. D, *infra*, at p. D-5, 8, 9). On August 17, 1973, sixty-four days after the FPC order was issued, Mid-South filed a motion claiming it had not understood that the original FPC order applied to it despite the specific reference in such order to its contract, which motion the FPC denied as being untimely (App. F, *infra*, p. F-3).[5] Despite the fact that Mid-South failed to satisfy the statutory prerequisite to its jurisdiction stipulated in the Federal Power Act,[6] namely an application for rehearing filed within thirty days, the Court of Appeals, considering the "equities", excused performance of the statutory prerequisite stating that Mid-South had not been "unreasonable in assuming" that the FPC order did not apply to it (App. A, *infra*, p. A-20, note 35).

In its order, the FPC permitted the new Gulf States rate to apply as an initial rate to deliveries in excess of the maximum delivery commitment in the Mid-South contract previously accepted for filing by the FPC and ordered

[5] Timely objections to the same determination ultimately complained of by Mid-South had been filed by two other intervenors in the FPC proceeding. See references in FPC order issued August 7, 1973, to applications for rehearing by Southwest Louisiana Electric Membership Corporation and Houston County Electric Cooperative. App. E, *infra*, at p. E-2, 5.

[6] 16 U.S.C. § 8251, App. G, *infra*, p. G-4.

a hearing to determine if such initial rate was just and reasonable. The Court of Appeals remanded the Mid-South case to the FPC for a determination of whether, as urged by Mid-South, the fact that the parties had delivered and received quantities of power in excess of the contract limitation had effected a modification of the contract, thereby presumably making the additional sales subject to the old fixed-rate found by the FPC to be applicable to sales below the contracted maximum commitment. (App. A, *infra,* p. 24). The Court of Appeals said that if the contract had been modified the FPC might reject the modification in proceedings under Section 205(e) as "not in the public interest," but instructed the FPC that it should apply the *Sierra* tests in its initial review of the modifications under Section 205(e). (App. A, *infra,* at p. A-25, note 48.)

Gulf States' motion for rehearing en banc and petition for rehearing was denied on January 12, 1976 (App. C, *infra*), and the decision of such Court of Appeals is hereby brought for review to this Court.

REASONS FOR GRANTING THE WRIT

Eighteen years ago in the *Memphis* case this Court had to accept and overturn the action of this same Court of Appeals in a similar case to prevent a serious frustration of rate administration under the Natural Gas Act. At that time the Court said:

> "It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies

> should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult if not impossible."[7]

This policy is equally applicable under the substantially identical rate regulation provisions of the Federal Power Act, and after eighteen years of almost unprecedented inflation and many-fold price increases in construction, operating, and fuel costs, the national importance of assuring proper rate regulation is far greater now. It is common knowledge that the supply of electric energy is in a crisis status in the United States. Stable power supply now and for the future can only be supplied by companies permitted to charge rates reflecting current inflating costs to which they are lawfully and contractually entitled. In such a crises it is imperative that the Courts of Appeal honor the *Memphis* rule established by this Court and not extend the strict doctrine of *FPC* v. *Sierra Pacific Power Co.*[7a] into new areas in which it was never intended by this Court to apply.

Even if the rate issues in this case were not of such national importance, the constitutional and procedural travesties commited by the Court of Appeals in this case make it mandatory that this Court exercise its ultimate responsibility of supervision.

I.

1. By its action in the Sam Rayburn portion of this case, the Court of Appeals effectively denied Gulf States

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[7] 358 U.S. 103, 113, 79 S. Ct. 194, 200, 3 L. Ed. 2d 153 (1958)
[7a] 350 U.S. 348, 76 S. Ct. 368, 100 L. Ed. 388 (1956).

due process of law by depriving Gulf States of all opportunity to be heard with respect to adjudication of a fact issue involving its own intent.[8] Rate cases in the FPC such as this one have all of the essential elements of contested litigation. Sam Rayburn and others here sought to prevent Gulf States from getting a rate increase. This Court has recognized

> "It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood and the proceeding attacked them at a vital spot."[9]

A due process right to hearing under such circumstances has been consistently recognized and protected by this Court.[10] In the *Morgan* case, this Court held that the liberty and property of a citizen shall be protected by the rudimentary requirements of "fair play" and that "a fair and open hearing" was an "inexorable safeguard."[11] The invasion by the Court of Appeals of the constitutional right of Gulf States to have an opportunity for hearing on a fact issue deemed by the Court of Appeals to be crucial is intolerable, and no remedy exists but for this Court to accept its supervisory responsibility over the Court of Appeals.

2. By its action in making an initial determination of a fact issue thought to be essential by the Court of Appeals

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[8] In rate cases Gulf States is assured an opportunity for hearing under Sections 205 and 206 of the Federal Power Act. 16 U.S.C. §§ 824d and 824e. App. G, *infra*, p. G-2, 3.

[9] *Morgan* v. *U.S.*, 304 U.S. 1, 20, 58 S. Ct. 773, 777, 82 L. Ed. 1129 (1938).

[10] *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937).

[11] 304 U.S. 1, 14, 15, 58 S. Ct. 773, 775, 82 L. Ed. 1129 (1938).

in the Sam Rayburn portion of this case,[12] the Court of Appeals acted directly in conflict with the decision of this Court in *Colorado-Wyoming Gas Co.* v. *F.P.C.*, where this Court said:

> "The review which Congress has provided for these rate orders is limited. Sec. 19(b), 15 U.S.C.A. § 717r(b) says that the 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.' But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest . . . Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. § 19(b). The courts cannot perform the function which Congress assigned to them in absence

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[12] The record is clear that the FPC acted as a matter of law with respect to Sam Rayburn's contentions and its self-serving affidavits (App. D and E, *infra*, at pp. D-4 and E-6). The Court of Appeals expressly went further and made a fact finding of intent based on extrinsic material, stating "An examination of various features of the contract itself, *as well as certain extrinsic material* (*consideration of which is proper because of the arguably ambiguous nature of the contract provisions*), points inescapably to the concusion that . . ." (emphasis added) (App. A, *infra*, at p. A-11) and concluding "In view of the plain import of the contract language *and the extrinsic materials* available to this court for consideration, the FPC's decision is reversed." (emphasis added). App. A, *infra*, p. A-17). The Court of Appeals has since expressly confirmed that it did in this case rely upon the untested extrinsic material, which the Court of Appeals incredibly characterized as "uncontroverted", to resolve the "arguably ambiguous" contract provisions. *Appalachian Power Co. and Kentucky Utilities Company* v. *FPC*, Nos. 72-1290 and 73-2085, ... U.S. App. D.C. ....., ... F.2d ..... (Jan. 8, 1976), at ftns. 37 and 40. It is Gulf States' position that the construction of the Sam Rayburn contract made by the FPC as a matter of law was correct and that there was no need for any determination of intent from extrinsic material.

> of adequate findings. *Nor are they authorized under § 19(b) to make findings and substitute them for those of the Commission.*" (Emphasis added).[13]

Section 313(b) of the Federal Power Act, under which the instant FPC proceedings were brought, is identical to Section 19(b) of the Natural Gas Act in this respect.[14] Thus, the Court of Appeals had no jurisdiction to make an initial fact determination, and when there is no jurisdiction, this Court has said that "neither the action of the court nor the consent of the parties could give it."[15]

3. By its action the Court of Appeals also violated clear principles for judicial review long recognized by this Court. As expressly noted by this Court in the *Memphis* case, unless the appellate court is making its own determination as a matter of law, which is not the case here, the appellate court's only function is to scrutinize the record to satisfy itself that the Commission's determination as to the meaning of the contract was "amply supported both factually and legally."[16] Here the Court of Appeals adjudicated a fact issue which had never even been tried or heard before as a fact issue by the FPC. This also clearly violates the rulings of this Court that "*de novo* review is appropriate only where there are inadequate fact-finding procedures in an adjudicatory proceeding, or where judicial

[13] 324 U.S. 626, 634, 65 S. Ct. 850, 854, 89 L. Ed. 1235 (1945).

[14] 16 U.S.C. § 8251, App. G, *infra*, at pp. G-4-6. Likewise, to the extent applicable, the Administrative Procedures Act, 5 U.S.C. § 554 and 706, requires that fact adjudications be made by the appropriate administrative body in proceedings guaranteeing due process and contemplates no jurisdication in the appellate court to make initial fact determinations. App. G, *infra*, at pp. G-6-9. Further, interpretation of a rate contract was clearly within the area of the FPC's special administrative expertise.

[15] *Four Hundred and Forty-three Cans of Frozen Egg Product*, 226 U.S. 172, 33 S. Ct. 50, 57 L. Ed. 174 (1912). Gulf States has at no point consented to jurisdiction and urged its objection to the Court of Appeals.

[16] 358 U.S. 103, 114, 79 S. Ct. 194, 201, 3 L. Ed. 2d 153 (1958).

proceedings are brought to enforce certain administrative actions."[17] Neither situation applies here.

Perhaps it is understandable that the District Judge sitting by appointment and writing for the Court of Appeals was accustomed to such procedure in district court, but such procedure at the appellate level violates well established principles of appellate review as well as the statutory limit on the Court of Appeals' jurisdiction.

4. Even without the improper adjudication of the fact issue of intent thought to be essential by the Court of Appeals, its view of the contract clause in this case conflicts with the decision of this Court in the *Memphis* case as a matter of law.

In the *Memphis* case this Court clearly instructed this same Court of Appeals that rate changes were permissible when the contract contemplated that a rate change might be made. This Court specifically reviewed the construction made by the FPC and concurred that the simple clause "or any effective superseding rate schedule" was legally sufficient to constitute a reservation of a right by the public utility to seek unilaterally from the regulatory agency the right to impose rate changes. In the instant case the clause in question is much more explicit in such reservation:

> "If a rate increase or decrease should be made applicable to the service rendered by Gulf States to the Sam Dam Coop hereunder by final order or by acceptance for filing by Gulf States of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to such service rendered hereunder from and after the effective date of such rate change."

[17] *Camp* v. *Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

With this Court's determination in *Memphis* as at least a minimum standard, there can be no question that the Court of Appeals' determination in this case is erroneous as a matter of law. It may appear harsh to accuse the Court of Appeals of disobedience to the mandate of this Court in *Memphis,* but the question must be raised when it is considered to what lengths the Court of Appeals went to avoid applying *Memphis*:

(a) It violated constitutional rights, established procedures of judicial review, and federal statutes as shown above.

(b) Although urged to it by Gulf States, it completely ignored the fact that a substantially identical clause in dependent form (which dependent form the Court of Appeals considered significant) had been conceded by Sam Rayburn and its same counsel to be a *Memphis* clause.[18]

(c) It made assumptions and put critical reliance on them when the uncontroverted record clearly showed them not to be true. It *assumed* that the dependent clause in question was not a "usual" form for reserv-

[18] Typical was the clause in the Gulf States' contract with Sam Rayburn's member, the City of Liberty, which it represented, conceded by Sam Rayburn to be a *Memphis* clause, found in the Record at page 1050 and in Appendix D hereto, *infra,* at p. D-17:

> "If a rate increase or decrease should be made, applicable to the class of service furnished hereunder, by the Company, or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change."

The Court of Appeals noted the concession (App. A, *infra,* at p. A-13 at note 25), but somehow overlooked the contract clauses in the record and proceeded more comfortably on its own assumption instead in reaching its own initial fact determination as to the intent of the parties.

ing such a right, when the record showed that it was not only usual but was the same form as the clauses conceded to be *Memphis* clauses.[19] It *assumed* that the Gulf States-Sam Rayburn contract was perpetual when the record clearly showed it expired in 1985. (R. p. 413). It *assumed* that Sam Rayburn had no remedy against unilaterally sought rates changes by Gulf States when the Federal Power Act itself assures Sam Rayburn the same rights assured to all customers of full administrative and judicial rights to contest any such rate changes.[20]

II.

In the Mid-South portion of this case, the Court of Appeals made another *de novo* determination of fact to the effect that Mid-South was not "unreasonable" in assuming that the initial FPC order would not apply to it. (App. A, *infra,* at p. A-20, note 35). In so doing the Court of Appeals ignored the express references in such FPC order explicitly applying to the Mid-South contract, and the Court of Appeals went further and used its "equity" power to frustrate the explicit jurisdictional prerequisites established by statute.[21] The Court of Appeals cites as its authority for such power *Ford Motor Co.* v. N.L.R.B.[22] In that case this Court merely said that a court of appeals could use its equity powers to design the appropriate form of remand order. Thus, the issues of whether or not the court of ap-

[19] See footnote 18 above.

[20] 16 U.S.C. § 824d and l. App. G, *infra* at pp G-2-4.

[21] 16 U.S.C. § 825l requiring application for rehearing within thirty days. App. G, *infra* at p. G-4.

[22] 305 U.S. 364, 59 S. Ct. 301, 83 L. Ed. 221 (1939). In point of fact, this case actually confirms the invalidity of this Court of Appeals' initial fact determination in the Sam Rayburn portion of this case by stating that remand is the proper procedure if it is determined that additional findings are necessary on essential points.

peals ever had jurisdiction to begin with and whether such court of appeals could use its "equity powers" to bootstrap itself into jurisdiction were not even involved. The opinion of this Court cited by the Court of Appeals simply does not authorize the use of an equity power to excuse a statutory, jurisdictional prerequisite to further administrative and judicial review, and no such authority has been found elsewhere. As quoted above in the ***Four Hundred and Forty-three Cans*** case, this Court has to the contrary expressly stated that where the court of appeals had no jurisdiction upon the appeal, "neither the action of the court nor the consent of the parties could give it."[23]

III.

With respect to the Mid-South case, the Court of Appeals has carried the *Sierra* doctrine far beyond the bounds set by this Court and has severely limited the FPC's jurisdiction over initial rates for new sales.

Here Mid-South has urged that a course of conduct may have modified the original contract to include sales not covered by the only contract in existence and on file with the FPC. The Court of Appeals has required the FPC to determine if such modification did occur. The consequence of such modification in this case would effectively be the creation of a *new contract* covering sales *not* covered by the only previously existing contract. If the FPC should determine on remand that such a modification was effected, the Court of Appeals instructed that in the FPC's proceeding for initial review of such modification it could only reject the modification if the *Sierra* tests were met, noting specifically that unprofitability would be insufficient grounds for rejection. By such instruction the Court of

[23] *Supra,* footnote 15.

Appeals has again, as it did in *Memphis,* misinterpreted the *Sierra* doctrine.

In the *Sierra* case this Court held that a utility may not unilaterally change an existing rate being charged for sales previously contracted and reviewed by the FPC unless and until the FPC under a Section 206 proceeding determines that the existing contract rate is so low as to adversely affect the public interest applying certain strict tests, noting particularly that unprofitability is not one of the tests.[24] In no way did the *Sierra* decision purport to require the FPC to apply such strict tests in a proceeding wherein the FPC has its first opportunity for initial review of a contract modification, or new contract, and for initial review of the rates initially to be charged for the new sales covered by such modification or new contract.

In the instant case Gulf States, of course, in good faith believes that its conduct has not modified its contract. This is not a case of Gulf States' trying to get out of an improvident bargain knowingly made as was the case in *Sierra.* If a fact determination were to be validly made after-the-fact that its conduct had effected a contract modification, the net result of the Court of Appeals' decision would be that such conduct (which in another case might not involve good faith and might even involve a private agreement between the parties) would operate to totally foreclose the FPC from any opportunity ever to review as an initial rate the rate to be charged for sales not previously covered by any contract and never before presented to the FPC for review.[25] Instead, the FPC would only be permitted to review the initial rate under the strict

[24] 350 U.S. 348, 355, 76 S. Ct. 368, 372, 100 L. Ed. 388 (1956).

[25] The FPC urged below that if the utilities and their customers can, by contract or conduct, effectively change the FPC's existing rate orders without FPC involvement or concurrence, its power to protect the public is destroyed.

Sierra tests. If Gulf States had been in a position to get Mid-South to modify its contract to cover additional sales at a new rate, under the Court of Appeals' instruction the FPC would apparently be powerless to fulfill its responsibility to protect the public by applying the tests of justness and reasonableness provided for in the statute and would be required instead to determine if the new rate were "so low as to adversely affect the public interest." Such result is completely inconsistent with the authority expressly granted to the FPC in Sections 205 and 206 with respect to initial rates.

CONCLUSION

In its determination of an adjudicative fact (namely the intention of the parties to the contract) as an initial fact-finding in this case and its use of a so-called "equity power" to take jurisdiction when it had none, the Court of Appeals has carried "judicial liberality" too far and has acted with disregard for established law.

In its requirement that the *Sierra* doctrine be applied in Sections 205 and 206 proceedings for initial review of contracts for sales not previously covered by contract and the initial rates to be charged therefor, the Court of Appeals has expanded the *Sierra* doctrine far beyond its limits and seriously frustrated proper contract and rate regulation under the Federal Power Act.

For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

B. H. HUGHES
Counsel for Petitioner

April, 1976

APPENDIX A

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION,
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v.

FEDERAL POWER COMMISSION,
Respondent,

Gulf States Utilities Company, *Intervenor.*

Nos. 73-1996, 73-2167.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 21, 1974.

Decided July 11, 1975.

Wholesale buyers of electricity petitioned for review of orders of the Federal Power Commission approving rate increases. The Court of Appeals, Justice, District Judge, held that, under the terms of one contract, and in light of extrinsic considerations which could be considered because

of the arguable ambiguous nature of the contract provisions, electric supplier did not have the power to effect rate changes by unilateral application to the FPC; and that with respect to other contract, if the parties to the contract, by their conduct subsequent to the date thereof, modified the contract, electric supplier and the FPC were bound by the modified terms, whether or not the supplier met its responsibility of reducing the modifications to writing and filing them with the FPC, and thus the FPC could not approve rate increase without ascertaining whether proposed increase would conflict with any existing contractural arrangement, including modifications by conduct.

Reversed and remanded with instructions.

1. Electricity — 11.2(2)

Where rate change provisions in electric supply contract were arguably ambiguous, consideration could properly be given to certain extrinsic material, such as considerations which would induce one party or the other to agree to contract under particular construction thereof and affidavits stating understanding of the parties.

2. Electricity — 11.2(2)

Where electric supply contract provided for renegotiation of rates provided therein and further provided that "If a rate increase or decrease should be made applicable • • • by final order • • • of any regulatory body • • •, such increased or decreased rates shall be applicable to such service rendered hereunder from and after the effective date of such rate change," the latter provision constituted acknowledgment that even agreed-on rate increase would necessarily be subject to final approval of appropriate regulatory agency and would not become effective until

agency so ordered, but did not empower the supplier to effect rate changes by unilateral application to a regulatory agency. Federal Power Act, §§ 1 et seq., 205(e), 206(a), 313(b), 16 U.S.C.A. §§ 791a et seq., 824d(e), 824e(a), 825l(b).

3. Contracts — 247

Parties may evidence a modification of original terms of a contract by their subsequent conduct.

4. Electricity — 11.3(6, 7)

Where it was not clear, until after further order on August 7 clarifying the earlier order, that purchaser of electric power was "aggrieved" by June 14 order of the FPC, and purchaser filed application for rehearing on August 20, application for rehearing was timely filed and, following denial, Court of Appeals had jurisdiction over petition for review. Federal Power Act, § 313(a, b), 16 U.S.C.A. § 825l (a, b).

5. Electricity — 11.3(1)
Gas — 14.3(2)

Doctrine that generally the Federal Power Commission has no power under the Federal Power Act or the Natural Gas Act to accept for filing rates contravening existing contracts is not limited only to such contracts as are properly filed with and recognized by the FPC. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; Federal Power Act, § 1 et seq., 16 U.S.C.A. § 791a et seq.

6. Electricity — 11.3(1)

If conduct of electric supplier and purchaser effected a modification of rights and obligations of the parties as originally set forth in their contract filed with the FPC,

supplier was under duty to notify the FPC of the pertinent modifications.

7. Electricity — 11.3(1)

If parties to electric supply contract did by their conduct subsequently modify it with respect to amount of electricty to be supplied, supplier and the FPC were bound by the modified terms, when supplier sought rate increases, whether or not supplier met its responsibility of reducing the modifications to writing and filing them with the FPC.

8. Electricity — 11.2(2)

It is possible for parties to electric supply contracts who are subject to the regulatory authority of the FPC to modify their contractual arrangements by subsequent conduct.

9. Electricity — 11.3(6)

The Federal Power Commission was under a duty, at time of electric supplier's attempt to increase its rates with respect to wholesale purchaser, to ascertain whether proposed increase conflicted with any existing contractual arrangement between supplier and purchaser, and such inquiry would necessarily include an evaluation of purchaser's claim that mutual course of dealing served to effect a modification of the terms of original written contract on file with the FPC.

10. Electricity — 11.3(1)

If electric supplier and wholesale purchaser modified contract by subsequent conduct, the FPC retained its statutory authority to reject proposed modification of utility's contractual obligations if it found that proposed change was not in the public interest. Federal Power Act, § 205(e), 16 U.S.C.A. § 824d(e).

11. Electricity — 11.3(1)

An electric supply contract is not contrary to the public interest, within statutes empowering the FPC to prescribe a change in rates or to reject newly filed contract not in the public interest, simply because contract may be unprofitable to the utility that entered into it. Federal Power Act, §§ 205(e), 206(a), 16 U.S.C.A. §§ 824d(e), 824e(a).

Petitions for review of orders of the Federal Power Commission.

Northcutt Ely, Washington, D. C., with whom Frederick H. Ritts, was on the brief, for petitioner Sam Rayburn Dam Elec. Co-op.

William Wise, Washington, D. C., for petitioner Mid-South Elec. Co-op.

Thomas M. Walsh, Atty., F. P. C., Washington, D. C., with whom Leo E. Forquer, Gen. Counsel and George W. McHenry, Jr., Sol., Washington, D. C., were on the brief, for respondent F. P. C.

Benny H. Hughes, Jr., Beaumont, Tex., was on the brief for intervenor Gulf States Utilities Co.

Before DANAHER, Senior Circuit Judge, WILKEY, Circuit Judge, and JUSTICE,* United States District Judge for the Eastern District of Texas.

JUSTICE, District Judge:

Petitions for review of certain orders of the Federal Power Commission[1] have been filed by Sam Rayburn Dam

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).
[1] Hereinafter "FPC".

Electric Cooperative[2] and Mid-South Electric Co-operative,[3] pursuant to Section 313(b) of the Federal Power Act,[4] and consolidated for consideration by the court. The intervenor, Gulf States Utilities Company,[5] supplies electric power to Sam Rayburn and Mid-South under the provisions of contracts of long standing. On April 10, 1973, Gulf States filed with the FPC a request for a rate increase affecting its wholesale customers, among them Sam Rayburn and Mid-South. Both petitioners filed protests and motions, demanding that the FPC reject the proposed rate increase. Subsequent orders[6] of the FPC had the effect of permitting the increase with respect to specified power supplied to the petitioners by Gulf States; the petitioners seek review of those orders before this court. We reverse the decision of the FPC in each case and remand them to the FPC with instructions.

THE GULF STATES — SAM RAYBURN CONTRACT

The Southwestern Power Administration,[7] formed in 1945 under the Flood Control Act of 1944,[8] bears the responsibility for dispensing the power generated at federal dams in Missouri, Oklahoma, Kansas, Texas, Arkansas, and Louisiana. At the time that the electric power generating facilities of the Sam Rayburn Dam and Reservoir Project on the Angelina River in Texas were in the planning and construction stages, the SPA entered into negotiations

[2] Hereinafter "Sam Rayburn".
[3] Hereinafter "Mid-South".
4 16 U.S.C. § 825l (b) (1970).
[5] Hereinafter "Gulf States".
[6] The Commission's order of June 14, 1973, set forth for the first time its conclusion that the contract between Sam Rayburn and Gulf States permitted the proposed rate increase. Its order of August 7, 1973, denying Sam Rayburn's application for rehearing reaffirmed its earlier decision.
[7] Hereinafter "SPA".
[8] 16 U.S.C. § 825s (1970); see U.S.C. § 825s-1 (1970).

with both Gulf States and a then-existing cooperative known as Tex-La Electric Cooperative concerning the disposition of the Dam's electric power. Particular members of the Tex-La Cooperative would not have been served by any arrangement with the SPA or Gulf States; consequently, there was considerable sentiment that the Tex-La group should build or contract for its own electric generating facilities. As the negotiations became less fruitful, the Administrator suggested that those members of Tex-La who could benefit from the Dam's electric generating capacity form their own organization. Accordingly, the Sam Rayburn Dam Electric Cooperative, Inc., was formed. Its members included four municipalities and two electric cooperatives.[9]

Under Section 5 of the Flood Control Act of 1944,[10] electric cooperatives are entitled to preference in the purchase of electric power from federal dams. Sam Rayburn, however, was not well-placed to utilize this advantage, because it controlled no lines for the transmission of power from the Dam. Gulf States, on the other hand, owned lines capable of transmitting power from the Dam, but did not enjoy preferred customer status. With the encouragement of the SPA Administrator, Sam Rayburn and Gulf States negotiated an agreement whereby Sam Rayburn would buy power at the dam site from the SPA and resell it immediately, for the same price, to Gulf States. The latter would,

[9] The municipalities are Vinton, Louisiana; Jasper, Texas; Liberty, Texas; and Livingston, Texas. The cooperatives are Sam Houston Electric Cooperative and Jasper-Newton Electric Cooperative. The original contracts between Sam Rayburn and the SPA and Sam Rayburn and Gulf States apparently contemplated that a third cooperative, the Southwest Louisiana Electric Membership Corporation, would become a member of Sam Rayburn, but, insofar as the record reflects, that expectation was not realized.
[10] 16 U.S.C. § 825s (1970).

in turn, furnish power service to the members of Sam Rayburn.

Several contracts were necessary to effectuate this arrangement. Sam Rayburn entered into a contract with the SPA for the purchase of the dam site power at a stated monthly rate, with increases to be negotiated no more frequently than every five years (beginning no earlier than July 1, 1970). The contract included a provision giving Sam Rayburn an option to terminate the contract if a proposed increase should be unacceptable. Sam Rayburn also signed contracts with each of its members, municipal and cooperative, setting forth the respective duties and privileges of the organization and its members. All of these contracts referred to the provisions of the final contract necessary to the arrangement, *i.e.*, the contract between Sam Rayburn and Gulf States.

All the parties to the Sam Rayburn-Gulf States contract now concede that the "draftsmanship evidenced by the contract leaves much to be desired." The scheme of the contract places in separate articles the provisions for "Sale of Power and Energy by the Company[11] to Sam Dam Co-op[12] for Delivery to Certain Specified Member Municipals" (Article 3) and "Sale of Power and Energy by Gulf States to the Sam Dam Co-op for Delivery to Certain Specified Rural Electric Distribution Cooperatives" (Article 4). Under each Article, a subsection 4 contains the provisions for "Compensation by the Sam Dam Co-op to Gulf States."

Subsection 4 of Article 3 provides that Sam Rayburn shall compensate Gulf States monthly for energy delivered to municipal members according to an attached rate sched-

[11] The contract used this abbreviation for Gulf States.
[12] The contract used this abbreviation for Sam Rayburn.

ule, "SR-1". It provides, in addition, that Sam Rayburn may negotiate for modification of the SR-1 rates if the SPA lowers the cost of power at the dam site, and that Gulf States may negotiate for modification if the SPA increases dam-site cost. Further, this provision stipulates that a change in SPA charges gives one party a privilege to open negotiations for a rate change; if the parties are unable to agree on a new rate, the party with the privilege of negotiation may cancel the entire contract.

Subsection 4 of Article 4 provides that Sam Rayburn must compensate Gulf States for power delivered to its cooperative members at rates set by a second rate schedule, denominated "SR-2": Like its counterpart in Article 3, it contains a renegotiation clause, but renegotiation privileges with respect to SR-2 rates need not be triggered by a change in SPA pricing. Rather, under the provisions of Article 4, Gulf States may make a written request for renegotiation any time after January 1, 1970, but not more often than once every five years; if the parties are unable to agree on a modification of SR-2 rates after a renegotiation request from Gulf States, then Gulf States may, at its sole option, cancel the entire contract on thirty-six months' notice. It should be noted that Sam Rayburn has no renegotiation or cancellation privileges under Subsection 4 of Article 4.

In addition to the involuted, conjoint stipulations already mentioned, Subsections 4 of both articles contain the following identical provision:

> (c) If a rate increase or decrease s[illegible]ld be made applicable to the service rendered by [illegible]ulf States to the Sam Rayburn Co-op hereunder by final order or by acceptance for filing by Gulf States of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to such service

rendered hereunder from and after the effective date of such rate change.

This language is the source of the controversy among Sam Rayburn, Gulf States, and the Federal Power Commission.

In companion cases, FPC v. Sierra Pacific Power Co.[13] and United Gas Pipe Line Co. v. Mobile Gas Service Corp.,[14] the Supreme Court announced the so-called *Sierra-Mobile* doctrine. It there ruled that, except in rare cases,[15] the Federal Power Commission has no power under the Federal Power Act[16] or the Natural Gas Act,[17] to accept for filing rates that contravene existing contracts. This court has applied and reaffirmed the doctrine consistently, most recently in City of Richmond v. FPC.[18] The *Sierra-Mobile* doctrine does not, of course, dictate that unilateral rate changes may never be accepted by the Commission. In United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division,[19] the Supreme Court made clear that the Commission has power to accept unilateral rate changes for filing when they are submitted by a seller that, in contracting

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[13] 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956).

[14] 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956).

[15] The Commission is empowered under § 206(a) of Title II of the Federal Power Act to prescribe a change in existing contract rates whenever it determines that existing rates are unjust or unreasonable. There is no contention in this case that the rates fixed by the existing contract between Sam Rayburn and Gulf States are either. The Commission may also reject a newly filed contract if after a hearing it finds that the contract is not in the public interest, pursuant to § 205(e).

[16] 16 U.S.C. § 791a et seq. (1970).

[17] 15 U.S.C. § 717 et seq. (1970).

[18] 156 U.S.App.D.C. 315, 481 F.2d 490, cert. denied, Indiana & Michigan Electric Co. v. Anderson Power and Light of City of Anderson, Indiana, 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed.2d 473 (1973).

[19] 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153 (1958).

with its customers, has "reserved to [itself] the power to make rate changes in this manner."[20]

When Gulf States attempted to file its 1973 revised rate schedule, the question then presented to the FPC was whether Gulf States had reserved the power in its contract with Sam Rayburn to effect rate changes by unilateral application to a regulatory agency. The Commission ruled that the language of Subsections 4(c) of Articles 3 and 4 of the contract, quoted above, did grant Gulf States that privilege, and accordingly it permitted the proposed increase to go into effect. Approaching this decision of the Commission with the deference to which it is entitled,[21] we still are constrained to disagree with it.

[1, 2] An examination of various features of the contract itself, as well as certain extrinsic material (consideration of which is proper because of the arguably ambiguous nature of the contract provisions),[22] points inescapably to the conclusion that the language of Subsections 4(c) of Articles 3 and 4 was intended by the parties to reflect, first, an acknowledgment that even an agreed-upon rate increase would necessarily be subject to the final approval of the appropriate regulatory agency, and second, an understanding that such an increase could not become effective *until* the agency so ordered.

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[20] *Id.* at 114, 79 S.Ct. at 200. Contracts reserving such a right to the seller are thus known as *Memphis* or *Memphis*-type contracts; contracts lacking such a provision are described as *Sierra* or *Sierra*-type agreements.

[21] *See* 358 U.S. at 114, 79 S.Ct. 194; North Atlantic Westbound Freight Ass'n v. Federal Maritime Comm'n, 130 U.S.App.D.C. 122, 397 F.2d 683 (1968) *but see* Public Service Comm'n v. FPC, 141 U.S.App.D.C. 174, 177, 436 F.2d 904, 907 (1970).

[22] C. McCormick, Evidence § 219 (1954); 13 Tex.Jur.2d Contracts § 397 (1960); Lone Star Gas Co. v. X-Ray Gas Co., 139 Tex 546, 164 S.W.2d 504 (1942). The Sam Rayburn-Gulf States contract contains a provision stipulating that the contract is to be interpreted and enforced according to Texas law.

At the outset, it is instructive to compare the language of the two Subsection 4(c) provisions with the language of the other contract provisions concerning rate changes. Article 3, Subsection 4(b), which contains the renegotiation clause for SR-1 rates, requires that such rates "shall be reviewed and redetermined by the parties hereto" at the time of any change in SPA rates. Article 4, Subsection 4(b), concerning the privilege of Gulf States to ask for renegotiation after 1970 at five year intervals, contains the same "shall be reviewed and redetermined" language. In contrast, the language of the 4(c) subsection of each article is in the subjunctive: "If a rate increase or decrease should be made applicable..." It is certainly not usual for the existence of important contractual rights and obligations to be alluded to in a dependent grammatical clause, yet never set forth directly. Had the parties intended for 4(c) to provide an independent method for effecting a rate change, it appears more likely that they would have so indicated unequivocally, in language similar to that in the 4(b) provisions. Rather, the placement of the 4(c) language after the two contract provisions relating to rate changes, together with its conditional grammatical structure, indicates unmistakably that it refers to a method of implementing a rate change that has been negotiated pursuant to one of the 4(b) provisions.[23]

It is important to note the manner in which Gulf States' and the FPC's interpretation of the contract would affect Sam Rayburn's obligations pursuant to it: The contract

[23] Similar language appears again in the contract in Article 7, Section 1: "This Contract shall not become effective unless and until the rates, compensation, and terms and conditions, provided in both this contract and in the SPA-Sam Dam Co-op Contract are confirmed and approved by such state or federal regulatory bodies having jurisdiction and required by law to accept, confirm and/or approve such rates, compensation, and terms and conditions . . ."

has no time limit; it lasts for eternity, absent cancellation. The 4(b) provisions leave Sam Rayburn with a method of escape: Sam Rayburn may cancel the contract, if the prices demanded by Gulf States exceed Sam Rayburn's willingness or ability to pay them. But the interpretation of 4(c) contended for by Gulf States would mean that, if the FPC should grant its approval of a unilateral rate increase by Gulf States, Sam Rayburn would have no apparent remedy or relief from its perpetual obligation under the contract. It seems wholly implausible that the officers acting for Sam Rayburn would have been so derelict or imprudent as knowingly to bind the organization to this provision, since, if so construed, it would be manifestly disadvantageous and prejudicial to Sam Rayburn's interests.

In construing 4(c), a comparison of the rights and liabilities of Sam Rayburn's members before and after the tripartite agreement is enlightening. Prior to the negotiation of the SPA-Sam Rayburn-Gulf States tripartite agreement, all of the members of Sam Rayburn, both cooperative and municipal, were customers of Gulf States. The cooperative members had contracts with Gulf States that clearly did *not* permit unilateral rate changes, as the FPC recognized.[24] The municipal members, on the other hand, apparently had contracts contemplating that Gulf States could unilaterally modify its rate schedule by seeking the approval of the FPC for such an increase — in other words, *Memphis*-style contracts.[25] (The complete contracts between the municipal members and Gulf States are unfortunately not before the Court, not having been

[24] See "Order Suspending Proposed Rate Increase, Setting Matter for Hearing, and Instituting an Investigation Under Section 206" (FPC Docket No. E-8121, June 14, 1973) at 4 n. 4.

[25] Gulf States so contended in its brief, and Sam Rayburn conceded the point in its reply brief.

made a part of the record.) All of these contracts were suspended by Gulf States and the members for the duration of the Sam Rayburn-Gulf States contract, as a condition of the tripartite agreement. Sam Rayburn thus argues that it is absurd to suppose that the two cooperative members would have surrendered their rights under *Sierra*-type contracts for participation in a *Memphis*-type pact. Gulf States counters that it is equally nonsensical to presume that Gulf States would have foregone its rights under its four *Memphis* contracts with the municipalities in exchange for a *Sierra* agreement with Sam Rayburn.

There appear, however, to be two possible explanations favoring Sam Rayburn's contention and refuting that of Gulf States. First, the affidavit of the former Administrator of the SPA suggests that Gulf States was willing to abandon its *Memphis* contracts with the four municipalities to enter into a *Sierra*-type agreement with Sam Rayburn because it would thereby eliminate the possibility that the cooperative and the government would make arrangements for the delivery of electric power without Gulf States' participation. This is a convincing explanation, since it cannot be denied that government-supplied power was perceived as a threat by many Southwestern utilities in the past.[26] Yet there is a second possibility — that the surrender of Gulf States' rights under its *Memphis* contracts with municipalities was not a serious concession, because the contracts were cancellable at specified times by the municipalities. There is language in the suspension clauses of the Sam Rayburn-Gulf States contract suggesting that this was the case. Article 3, Subsection 2(b) of that contract,

[26] *See* Kansas City Power & Light Co. v. McKay, 115 F.Supp. 402 (D.D.C.1953), in which certain private utility companies attacked the formation of the SPA as a conspiracy to undercut their market positions in the Southwest.

which suspended the contracts between Gulf States and the municipalities for the duration of the tripartite agreement, provides:

> Any such contract with a member municipal shall be reinstated in full force and effect in the event this contract is terminated, or in the event service to such Member Municipal is otherwise discontinued under this contract, *prior to the earliest date such Member Municipal could have terminated its contract with Gulf States for electric service at the time of such suspension.* (Italics added.)[27]

As stated, the Gulf States-municipality contracts are not contained in the record before us, but it appears almost certain, from the quoted language, that they were cancellable by the municipalities at intervals. If the intervals were reasonably short, there is great force to Sam Rayburn's argument that Gulf States would have had little to lose by exchanging its existing agreements with the municipalities for a *Sierra*-type contract with Sam Rayburn. Moreover, if the Administrator's suggestion is correct, Gulf States might have had a great deal to gain from the exchange. No theory has been advanced, on the other hand, that could account for a decision by the member cooperatives to relinquish their *Sierra* contracts with Gulf States for *Memphis*-type arrangements. These extrinsic considerations reinforce the unmistakable sense of the language of the Sam Rayburn-Gulf States contract, *i.e.*, that it was always intended by both parties to create a *Sierra*-type agreement.

[27] The suspension clause relative to the member cooperatives, whose contracts with Gulf States clearly provided for optional cancellation at the end of a five-year period, contains precisely the same language.

Finally, the affidavit of the former Administrator of the SPA, which stands uncontroverted in the record, states his understanding of the Sam Rayburn-Gulf States contract at all times: neither party could unilaterally change the existing rates by filing a new rate schedule. The affidavit of the President of Sam Rayburn, who participated in the contract negotiations, deposes that, "At no time was it ever suggested that either party would have the right to unilaterally change the rate of compensation . . . Instead, we intended to have a change in compensation every five years by mutual agreement."

These affidavits were never considered by the FPC,[28] apparently because it took the position that the contract unambiguously bestowed on Gulf States the power to effect unilateral rate increases through application to the FPC. This position is indefensible. The FPC's distaste for the *Mobile-Sierra* doctrine is well known,[29] and it has been in the past necessary for this court to remind the FPC

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[28] The Commission clearly could have considered the affidavit as evidence under its own rules. 18 C.F.R. § 1.26 (1974).

[29] *See* Borough of Lansdale v. FPC, 161 U.S.App.D.C. 185, 191, 494 F.2d 1104, 1110 (1974) ("[t]he FPC very much dislikes the *Sierra — Mobile* doctrine,"), City of Richmond v. FPC, 156 U.S.App.D.C. 315, 322, 481 F.2d 490, 497 (1973). (". . . the Commission simply does not understand, or more likely is not willing to abide by, the fundamental principle of the *Sierra — Mobile — Memphis* decisions."); Philadelphia Electric Co. (FPC Docket No. E-7795, January 4, 1973) at 4 ("We now add as a guideline for this and future proceedings that inasmuch as we consider **fixed rate contracts in general to be not** in the public interest it is our intent to strictly construe such existing contracts so as to permit no enlargement of rights or obligations thereunder absent a clear showing of necessity to meet the public interest."); Carolina Power & Light Co., 47 F.P.C. 1, 4 (1972) (". . . in our judgment the *Mobile-Sierra* rule is inconsistent with sound regulatory policy. That rule has the effect of limiting our authority under Section 206(a) of the Federal Power Act.")

that it is not free to ignore the doctrine.[30] Here, as in past cases, the FPC has "attempted what may charitably be termed an 'end run'"[31] around the doctrine by straining to transform a contract that is unmistakably of the *Sierra* variety into a *Memphis*-type agreement. In view of the plain import of the contract language and the extrinsic materials available to this court for consideration, the FPC's decision is reversed. The case is accordingly remanded to the FPC, not for reconsideration, but with instructions to reject the proposed increase in rates for the supply of power pursuant to the Sam Rayburn-Gulf States contract.

THE GULF STATES—MID-SOUTH CONTRACT

The petitioner, Mid-South, entered into a contract with Gulf States in 1950 for the delivery of electric power. The original contract provided that Gulf States' maximum monthly commitment to Mid-South was 200 kilowatts, but granted Mid-South the right to request an increase of up to 300 kilowatts monthly, subject to Gulf States' privilege of designating the delivery points for the additional power. As the years passed, however, Mid-South's power needs grew, and Gulf States always furnished whatever power Mid-South required. In 1960, the earliest year for which figures are available, Gulf States delivered 1374 kilowatts to Mid-South during the peak month. The peak-month supply grew each year between 1960 and 1973, when it reached 11,940 kilowatts.

At the time Gulf States filed its 1973 request for a rate increase, Mid-South protested to the FPC, on the ground

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[30] City of Richmond v. FPC, 156 U.S.App.D.C. 315, 481 F.2d 490, cert. denied, Indiana & Michigan Electric Co. v. Anderson Power and Light of City of Anderson, Indiana, 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed.2d 473 (1973).

[31] *Id.* at 320, 481 F.2d at 495.

that its contract with Gulf States was of the *Sierra* variety and did not permit unilateral rate changes to be accomplished merely by regulatory approval. The FPC ruled that the contract between Mid-South and Gulf States, as well as several other contracts, was indeed of the fixed-rate of *Sierra* type. Referring to these contracts. the FPC's order of June 14, 1973, states: "With regard to deliveries in excess of the maximum contractual commitments of Gulf States under these fixed-rate contracts, we shall accept the new rates applied for herein as an initial filing . . ." Mid-South did not apply for rehearing or reconsideration with respect to the June 14 order, assertedly because its officials and attorneys believed that the extended course of dealing between Mid-South and Gulf States had effected an abrogation of Gulf States' initial "maximum contractual commitment" and substituted, instead, a commitment for Gulf States to supply Mid-South's total requirements. Thus, Mid-South expected that the order would not affect the rates for any power supplied to it by Gulf States. This expectation was short-lived.

On August 7, 1973, the FPC entered an order denying the applications for rehearing of certain other customers of Gulf States, a copy of which was directed to Mid-South. That order contained the following language:

> ". . . Whether or not Gulf States has in fact been supplying amounts of electric energy in excess of the maximum contract demand in the Company's FPC Rate Schedule . . . does not in any way alter the fact that only the Company's contract as filed with this Commission, along with any properly filed and accepted amendments can be regarded as embodying the presently effective contractual rates, terms, and conditions . . . We do not believe . . . that the Commission must be bound by practices carried on by the parties outside

> the contractual terms as presently filed with the Commission, where such practices are entirely without Commission knowledge or approval . . . where amounts of energy are proposed to be sold outside the contract demand parameters, the rates proposed for such sales may be viewed as an initial rate . . .."

Alarmed to discover that the FPC intended its June 14 language respecting "maximum contractual commitments" to refer only to those commitments evidenced by a paper contract on file with the FPC, Mid-South immediately filed an application for rehearing, dated August 20, 1973. Its application explained that this document had not been filed immediately after the June 14 order because it was not until the August 7 clarification of that order that Mid-South believed itself to have been affected by the June ruling.

Section 313(a) of the Federal Power Act[32] provides that a person aggrieved by an order of the FPC may file an application for rehearing within thirty days after the issuance of the order,[33] and that no proceeding to review an order of the FPC may be maintained unless the person who seeks to maintain it shall have first applied to the FPC for rehearing on the order. The FPC, taking the view that Mid-South's application for rehearing related to its June 14 order, denied the application as being untimely. We are now urged by the FPC and by Gulf States to dismiss Mid-South's petition for review on the ground that Mid-South has failed to meet the jurisdictional requirements of Section 313(a).

[3, 4] It is not at all clear, in the first place, that Mid-South was "aggrieved" by the order of June 14, rather

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[32] 16 U.S.C. § 8251(a) (1970).

[33] This requirement is also codified in the Commission's Rules of Practice, Rule 1.34(a), 18 C.F.R. § 1.34(a) (1974).

than the order of August 7, within the meaning of the Act. There appears to be little reason to disbelieve Mid-South's claim that it did not read the June 14 order as a ruling that it would be required to pay Gulf States' new proposed rate for all energy deliveries exceeding 300 kilowatts per month. It is a familiar principle of the law that parties may evidence a modification of the original terms of a contract by their subsequent conduct,[34] and Mid-South had no apparent reason to anticipate that the FPC would declare itself not to be bound to observe that principle in applying the *Sierra-Mobile* doctrine.[35] Its speedy filing of an application for rehearing after the August 7 order apprised it of the FPC's position lends credence to its claim, *viz.*, that it was not until the August order that it became clear to Mid-South that the June order would materially affect the rates it was paying for its electric service. There is no imaginable reason that Mid-South could have benefited from a "circumvention"[36] of the FPC's procedural rules by deliberately delaying the filing of its motion for reconsideration. The policy requiring timely filing of motions for reconsideration is one of fairness to the FPC and to parties affected by its order; only a perversion of that policy could be used to cut off the rights of a party that filed its application in good faith, as soon as it could reasonably have become aware of the import of an FPC order. Endorsement of the position that

[34] See notes 43-47 *infra* and accompanying text.

[35] We do not consider that simply because another party, the Southwest Louisiana Electric Membership Corporation, was sufficiently alarmed by the language of the June 14 order to file its application for rehearing on the grounds now urged by Mid-South, we must rule that Mid-South is held to a standard of equal zealousness. The test is not whether the most tireless of advocates might have foreseen the possibility that the Commission would take the position that it did, but whether Mid-South was unreasonable in assuming that it would not.

[36] This characterization is found in Gulf States' brief.

the FPC takes would permit an administrative agency to enter an ambiguous or obscure order, wilfully or otherwise, wait out the required time, then enter an "explanatory" order that would extinguish the review rights of parties prejudicially affected.

This court is not without authority to consider the equities of Mid-South's situation. In a similar case involving the National Labor Relations Board, the Supreme Court said:

> The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself, — to secure a just result with a minimum of technical requirements.[37]

Accordingly, we hold that Mid-South's application for rehearing was timely filed, that it complied with the requirements of Section 313(a), and that we have jurisdiction over its petition for review.

[5] Turning to the substantive contentions of the parties, we first address the argument advanced by Gulf States and the FPC that *Sierra's* language relative to the

[37] Ford Motor Co. v. NLRB, 305 U.S. 364, 373, 59 S.Ct. 301, 307, 83 L.Ed. 221 (1939). *See also* Natural Gas Pipeline Co. v. FPC, 128 F.2d 481, 484 (7th Cir. 1942) ("We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Courts of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit.")

integrity of "contracts" refers *only* to such contracts as are properly filed with and recognized by the FPC. The claim is thus made that the *Sierra-Mobile* doctrine does not bar a utility from initiating a unilateral rate change, even if it has a fixed-rate contractual obligation, so long as the obligation is not evidenced by documents accepted for filing by the FPC. This court has recently and firmly rejected that argument. In Borough of Lansdale, Pa. v. FPC, we said:

> The Commission must summarily reject rate filings inconsistent with outstanding fixed-rate contracts whether or not the contracts have been filed with the Commission.[38]

Although *Lansdale* concerned an existing contract that had been reduced to writing and had been tendered to the FPC for filing, there is not a scrap of language in the opinion suggesting, as the FPC argues, that the decision is limited to attempted abrogations of written contracts that have been tendered to and rejected by the FPC. To the contrary, *Lansdale* contained a great deal of very expansive language concerning the FPC's duty to respect contractual obligations of whatever nature. We summarized the position of the FPC therein as follows:

> It is contended that the *Sierra-Mobile* doctrine applies only to contracts previously accepted as lawful by the Commission.[39]

Our disposition of that contention was wholly unambiguous: "We have concluded that [this] argument misstates the law".[40]

In *Lansdale,* we further discussed the statutory duty of

[38] 161 U.S.App.D.C. 185, 195, 494 F.2d 1104, 1114 (1974).
[39] 161 U.S.App.D.C. at 187, 494 F.2d at 1106.
[40] 161 U.S.App.D.C. at 188, 494 F.2d at 1107.

utilities to reduce their contractual obligations to writing and submit them to the FPC for filing.[41] We held that the failure of Lansdale's supplier to perform this duty did not absolve it of its responsibility to abide by the unfiled contract's terms, nor did it relieve the FPC of its obligation to respect them:

> Breach of the filing obligation gains the company nothing, for rates established in a fixed-rate contract become effective for regulatory purposes even if the company bound by the contract neglects to file it.[42]

[6, 7] *Lansdale* is thus dispositive of several aspects of Mid-South's petition for review. If the conduct of Gulf States and Mid-South did effect a modification of the rights and obligations of the parties as originally set forth in the 1950 agreement, Gulf States was under a duty to notify the FPC of the pertinent modifications. It may be that this obligation was met by the filing of "Form 1 Annual Reports", which informed the FPC each year of the sales that were made to Mid-South by Gulf States and reflected the steadily increasing amounts; we need not decide the point at this time. In any event, if the parties did by their conduct subsequently modify the 1950 contract, Gulf States and the FPC are bound by the modified terms, whether or not Gulf States met its responsibility of reducing the modifications to writing and filing them with the FPC.

[8] In addition to the arguments rejected in *Lansdale*, the FPC advances the additional contention that it is not possible for parties to electric supply contracts who are subject to the FPC's regulatory authority to modify their contractual arrangements by subsequent conduct. This is an unacceptable position. Contract law has long recognized

[41] 161 U.S.App.D.C. at 194, 494 F.2d at 1113.
[42] *Id.*

that parties to a contract may vary its terms by a subsequent course of conduct.[43] In Matanuska Valley Farmers Cooperating Ass'n v. Monaghan,[44] it was held that the conduct of a dairy cooperative and its members subsequent to the execution of a written contract served to create an agreement to modify the original terms of the contract. The court states in its opinion:

> It is well established that parties to a contract can, by mutual agreement, modify or rescind a contract and adopt in its stead a new agreement. An agreement to change the terms of a contract may be shown by the conduct of the parties, as well as by evidence of an explicit agreement to modify.[45]

Numerous other cases from various jurisdictions have set forth the same rule.[46] The law of Texas, where both Mid-South and Gulf States were chartered and the setting for performance of the contract, recognizes the possibility of modification evidenced by subsequent conduct.[47] The FPC has suggested no reason that the recognized law governing contracts should be ignored merely because the subject matter of a contract falls under the jurisdiction of the FPC. It is certainly no more burdensome for the FPC to examine and evaluate the conduct of the parties to a contract, when necessary, than it is for the courts to do so.

[9-11] Accordingly, we hold that FPC was under a duty,

[43] *See, e. g.*, 3A Corbin, Contracts § 524 at 297 (1960) ("A promisor, even though his promise has been put into clear written words, can always add to it, modify it, or wholly replace it by a subsequent tacit agreement, one in which his own promises are found wholly by inference from conduct other than words."); 17 Am.Jur., Contracts § 466.

[44] 188 F.2d 906, 13 Alaska 323 (9th Cir. 1951).

[45] *Id.* at 909.

[46] *See* cases cited at 17A C.J.S. Contracts § 375 nn. 97.15-98.

[47] 13 Tex.Jur., Contracts, § 271 (1960); Wood Motor Co. v. Nebel, 150 Tex. 86, 238 S.W.2d 181 (1951); Stowers v. Harper, 376 S.W.2d 34 (Tex.Civ.App. — Tyler 1964, writ ref. n. r. e.).

at the time of Gulf States' attempt to increase its rates with respect to Mid-South, to ascertain whether or not the proposed increase conflicted with any existing contractual arrangement between Gulf States and Mid-South. Such an inquiry would necessarily include an evaluation of Mid-South's claim that their mutual course of dealing served to effect a modification of the terms of the written contract on file with the FPC. In remanding this case to the FPC, we leave to it the initial determination of whether such a modification did in fact occur.[48] Accordingly, the FPC is instructed to conduct proceedings consistent with this opinion.

Reversed and remanded with instructions.

[48] Even assuming that it finds that Mid-South and Gulf States did modify their contract by subsequent conduct, the FPC, of course, retains its authority to reject the proposed modification of a utility's contractual obligations if it finds, pursuant to § 205(e), that the proposed change is not in the public interest. 161 U.S.App.D.C. at 195, n. 43, 494 F.2d at 1114 n. 43. Certain procedural difficulties might arise from the attempted use of § 205(e) authority to review modifications that do not come to the attention of the FPC until long after they have become effective as between the parties. It may be, however, as noted in the text, that the filing of annual reports reflecting the ever-increasing amounts of energy being sold to Mid-South by Gulf States did constitute adequate notice to the FPC of a change in their contractual arrangement. In that case, the question would arise whether the FPC may scrutinize any modifications pursuant to § 205(e) many months after the modifications were first submitted to it. We think that these questions are most appropriately left for the initial consideration of the FPC. Should it find that a hearing under § 205(e) would be permissible with respect to any modifications of the contract between Mid-South and Gulf States, it should keep in mind the Supreme Court's admonition that a contract is not contrary to the public interest simply because it may be unprofitable to the utility that entered into it. FPC v. Sierra Power Co., 350 U.S. 348, 355, 76 S.Ct. 368, 100 L.Ed. 388 (1956). That admonition applies equally to a review of existing rates pursuant to § 206(a).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 73-1996

SAM RAYBURN DAM ELECTRIC COOPERATIVE,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

GULF STATES UTILITIES COMPANY,
Intervenor

No. 73-2167

MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

GULF STATES UTILITIES COMPANY
Intervenor

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before: DANAHER, Senior Circuit Judge; WILKEY, Circuit Judge and JUSTICE*, United States District Judge for the Eastern District of Texas.

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Federal Power Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the decision of the Federal Power Commission is reversed and these cases are remanded with instructions to the Federal Power Commission, in accordance with the opinion of this Court filed herein this date.

Per curiam
For the Court:

Hugh E. Kline
Clerk

Date: July 11, 1975

Opinion for the Court filed by Judge Justice.

*Sitting by designation pursuant to 28 U.S.C. §292(d).

APPENDIX C-1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1975

No. 73-1996

SAM RAYBURN DAM ELECTRIC COOPERATIVE,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

GULF STATES UTILITIES COMPANY,
Intervenor

No. 73-2167

MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

GULF STATES UTILITIES COMPANY,
Intervenor

Before: Danaher, Senior Circuit Judge; Wilkey, Circuit Judge and Justice*, United States District Judge for the Eastern District of Texas.

ORDER

On consideration of respondent's and intervenor's petitions for rehearing, it is

ORDERED by the Court that respondent's and intervenor's aforesaid petitions are denied.

Per Curiam
For the Court:

/s/ ROBERT A. BONNER
Robert A. Bonner
Clerk

•Sitting by designation pursuant to Title 28 U.S.C. §292(d).

APPENDIX C-2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1975

No. 73-1996

SAM RAYBURN DAM ELECTRIC COOPERATIVE,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent
GULF STATES UTILITIES COMPANY,
Intervenor

No. 73-2167

MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent
GULF STATES UTILITIES COMPANY,
Intervenor

ORDER

Respondent's and intervenor's suggestions for rehearing *en banc* having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that respondent's and intervenor's aforesaid suggestions for rehearing *en banc* are denied.

For the Court:

/s/ ROBERT A. BONNER
Robert A. Bonner
Clerk

APPENDIX D

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., and
Rush Moody, Jr.

GULF STATES UTILITIES COMPANY

Docket No. E-8121

ORDER SUSPENDING PROPOSED RATE INCREASE, SETTING MATTER FOR HEARING, AND INSTITUTING AN INVESTIGATION UNDER SECTION 206

(Issued June 14, 1973)

On April 10, 1973, Gulf States Utilities Company (Gulf States) tendered for filing the following revised rate schedules:

Schedule 423 "Other Electric Corporations For Resale"

Rate Schedule SR-1 "Electric Service to Sam Rayburn Dam Electric Cooperative For Resale to Member Municipals"

Rate Schedule SR-2 "Electric Service to Sam Rayburn Dam Electric Cooperative For Resale to Member Rural Electric Distribution Cooperatives"

Schedule REA "Wholesale Power To Rural Electric Distribution Cooperative"

Schedule REA "Wholesale Power To or For Rural Electric Distribution Cooperative"

The Company states that the proposed rate changes would establish a fuel clause adjustment in all of the rate schedules (except Rate A under Rate Schedule SR-1) exactly the same as the fuel clause adjustment now included under FPC Schedule No. 104. Gulf States further indicates that the basic rate levels have been increased approximately forty per cent for service to rural electric cooperatives and for service to Sam Rayburn Dam Electric Cooperative, Inc. under Rate A of Rate Schedule SR-1 and under Rate Schedule SR-2 to FPC Schedule No. 98. The basic rate levels have purportedly been increased approximately twenty per cent for service to municipalities and for service to Sam Rayburn Dam Electric Cooperative, Inc. for resale to municipalities under Rate B of Rate Schedule SR-1 to FPC Schedule No. 98. The total amount of the increased revenues will be according to the Company, about $3.35 million.

The Company gives as its reasons for the proposed changes the necessity of recovering from customers increases in the Company's fuel costs and Gulf States' desire to make the rates and charges more closely support the Company's other costs of providing such service.

The Company states that most of the contracts affected by the application contain an express clause contemplating and permitting such rate increases as are now being sought. As to those not containing an express clause, in the event Commission should determine that the rate under any such contract may not be changed under the terms of the contract, Gulf States requests that the new rate be made effective as to all deliveries in excess of the maximum contractual commitment of Gulf States provided in such

contract and the Company further requests that the Commission find it in the public interest to move institution of a Section 206 proceeding as to the rate in such contract. The Company proposes an effective date of June 15, 1973.

The filing was noticed on April 18, 1973, with petitions to intervene and protests due on or before May 4, 1973. Petitions to intervene which were accompanied by various protests and motions were timely filed by: Southwest Louisiana Electric Membership Corporation; Kirbyville Light and Power Company; Mid-South Electric Cooperative Association; Robertson Electric Cooperative; Sam Rayburn Dam Electric Cooperative and its members; the Town of Welsh, Louisiana; the City of Caldwell, Texas; and Cajun Electric Power Cooperative, An untimely petition to intervene with accompanying motion to reject and protest was filed on May 9, 1973, by the Houston County Electric Cooperative, and untimely protests were filed on May 7, 1973, by the City of St. Martinville and on May 14, 1973, by the City of Kirbyville. These petitions and protests contained various allegations as to: (1) the reasonableness of the proposed rates; (2) discrimination; (3) the lawfulness of the proposed fuel clause; (4) compliance with applicable price guidelines; (5) anti-competitiveness; and (6) contract provisions regarding unilateral rate changes. In view of the action we are taking herein, it will not be necessary to discuss in detail the various allegations set forth in these petitions and protests, except as to the questions regarding the possible fixed-rate nature of the contract between Gulf States and the Sam Rayburn Dam Electric Cooperative (Sam Dam). In the Motion to Reject Filing, Protest, and Petition to Intervene of Sam Dam and its members, Sam Dam argues that its contract with Gulf States is a fixed rate contract despite the existence of what appears to be a *Memphis* clause in Articles III and

IV, Section 4, §§ (c).[1] The basis for this argument is that sub-section (b), when read in conjunction with §§ (a), provides a mechanism for the parties to review and redetermine rates upon written request of Gulf States, but not more often than once every five years. Sam Dam views §§ (c) as merely addressing itself to the implementation before the proper regulatory body of whatever agreement might be arrived at through the mechanism of §§ (b). We are not persuaded by this argument. Our reading of the contract provisions is that they simply set out alternate procedures by which that contract rate may be adjusted by Gulf States — either by negotiations with its customers or through direct application to the proper regulatory body.

Review of the rate filing indicates that it raises certain issues which may require development in an evidentiary hearing. The proposed increases in rates and charges have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we shall suspend the proposed increases and set the matter for hearing as hereinafter provided. Gulf States shall be directed to file within 60 days of the issuance of this order a complete updated cost-of-service study utilizing calendar year 1972 data. We note that the fuel clause proposed in this filing is not consistent with our Opinion No. 633, and we shall order Gulf States to file within 60 days of the issuance of this order a revised fuel clause consistent with Opinion No. 633.

A number of the contracts affected by this application are for various specified terms and either do not contemplate unilateral changes in rates by the Company or specify dates when such increases can go into effect.[2] We find

[1] See Appendix A for the relevant provisions of the Sam Dam contract.

[2] See the relevant language of all affected contracts as set out in Appendix A.

that three of these may be terminated by the Company in the near future or the Company may, by their terms, put into effect a rate increase on a specified date in the near future.[3] We shall therefore accept this application for rate increase as to those contracts for filing to become effective, subject to refund, upon the contractually specified dates and proper notice of such being filed with this Commission or upon Gulf States properly terminating such contracts and notice of such termination being filed with this Commission. (See our order of May 17, 1973, in *Alabama Power Company,* Docket Nos. E-8126 and E-8143). As to the other fixed rate contracts,[4] we shall institute an investigation under Section 206 of the Federal Power Act to determine if the rates contained therein are in the public interest. With regard to deliveries in excess of the maximum contractual commitments of Gulf States under these fixed rate contracts, we shall accept the new rates applied for herein as an initial filing to become effective June 15, 1973, the requested effective date, and institute an investigation under Section 206 to determine if such rates are in the public interest.[5]

We further note that the contract between Gulf States and Gueydan, Louisiana (FPC No. 49) has expired by its terms. We shall therefore accept the Company's application as it affects this rate schedule, subject to one day suspension as a part of the proceeding under Section 205.

Finally, we note that the contract with Cajun Electric Cooperative, Inc. (FPC No. 104) was suspended one day

[3] These contracts are: FPC No. 51 (Town of Welsh, Louisiana) terminable November 21, 1973; FPC No. 54 (City of Kaplan, Louisiana) terminable November 1, 1973; FPC No. 81 (Kirbyville Light and Power Company), terminable June 1, 1974.

[4] These other contracts are: FPC No. 69, 71, 72, 76, 79, ... and 87.

[5] *Ibid.*

until March 23, 1973, and made subject to hearing in Docket No. E-7676 by our order of March 1, 1973, in Docket No. E-8003. Since its terms do not preclude unilateral rate increases, the rate increase application as to this customer shall go into effect, subject to refund, and shall be a part of the Section 205 proceeding in this docket.

The Commission finds:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a Section 205 proceeding concerning the lawfulness of the rates and charges contained in Gulf States' Rate Schedules as proposed to be amended in this docket, but only as affecting those contracts which are not fixed rate contracts, and that the tendered rate schedules applicable to such contracts be suspended as hereinafter provided.

(2) The disposition of this proceeding should be expedited in accordance with the procedure set forth below.

(3) In the event this proceeding is not concluded prior to the termination of the suspension period herein ordered, the placing of the tariff changes applied for in this proceeding into effect, subject to refund with interest while pending Commission determination as to their justness and reasonableness, is consistent with the purpose of the Economic Stabilization Act of 1970, as amended.

(4) With respect to certain fixed rate contracts affected by this rate application, an investigation under Section 206 of the Federal Power Act should be ordered.

(5) As to deliveries in excess of the maximum contractual commitment under the fixed rate contracts, the new rates should become effective, as an initial filing, on June 15, 1973, and an investigation under Section 206 should be instituted to determine if such rates are in the public interest.

(6) As to the fixed rate contracts with the Town of Welsh, Louisiana (FPC No. 51) and the City of Kaplan, Louisiana (FPC No. 54), and Kirbyville Light and Power Company (FPC No. 81), the instant rate increase application should be effective, subject to refund, upon the contractually specified dates and proper notice of such being filed with this Commission or upon Gulf States properly terminating such contracts and notice of such termination being filed with this Commission.

(7) Gulf States should be directed to file a complete updated cost-of-service study utilizing calendar year 1972 data within 60 days of the issuance of this order.

(8) Gulf States should be directed to file within 60 days of the issuance of this order a revised fuel clause consistent with Opinion No. 633.

The Commission orders:

(A) The proposed rate schedules filed by Gulf States on April 10, 1973, are accepted for filing subject to the conditions hereinafter specified.

(B) Pursuant to the authority of the Federal Power Act particularly Section 205(e) thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held commencing with a prehearing conference on October 23, 1973, at 10 A.M., EDT, in a hearing room of the Federal Power Commission 825 North Capitol Street, N.E., Washington, D. C. 20426, concerning the lawfulness of the rates, charges, classifications, and services contained in Gulf States Rate Schedules as proposed to be amended herein.

(C) At the prehearing conference on October 23, 1973, Gulf States' prepared testimony together with its entire rate filing shall be admitted to the record as its complete

case-in-chief subject to appropriate motions, if any, by parties to the proceeding. All parties will be expected to come to the conference prepared to effectuate the provisions of Section 1.18 of the Commission's Rules of Practice and Procedure.

(D) On or before September 10, 1973, the Commission Staff shall serve its prepared testimony and exhibits. The prepared testimony and exhibits of any party which may be granted intervention by later order in this proceeding shall be served on or before October 31, 1973. Any rebuttal evidence by Gulf States shall be served on or before November 9, 1973. The public hearing herein ordered shall convene on November 27, 1973, at 10:00 A.M., EST.

(E) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose (See Delegation of Authority, 18 C.F.R. 3.5(d)), shall preside at the hearing in this proceeding, shall prescribe relevant procedural matters not herein provided, and shall control this proceeding in accordance with the policies expressed in the Commission's Rules of Practice and Procedure.

(F) Pending hearing and a final decision thereon, Gulf States' proposed tariff sheets as they affect FPC Rate Schedule Nos. 20, 24, 30, 49, 85, 86, 93, 95, 96, 98, 99, 101, 104, and 105 are suspended for one day and the use thereof deferred until June 16, 1973.

(G) As to those contracts which do not allow for unilateral changes in rates (FPC Rate Schedule Nos. 69, 71, 72, 76, 79, and 87), the new rates shall be made effective on June 15, 1973, as an initial filing as to deliveries in excess of the maximum contractual commitment as provided in such contract, and an investigation under Section 206 of the Federal Power Act is hereby instituted as to whether such rates are in the public interest and such investigation shall be joined with and a part of the proceedings ordered herein.

(H) As to the rates prescribed in the fixed rate contracts (FPC Rate Schedule Nos. 69, 71, 72, 76, 79, and 87), an investigation under Section 206 of the Federal Power Act is hereby instituted as to whether such rates are in the public interest and such investigation shall be joined with and a part of the proceeding ordered herein.

(I) As to the fixed rate contracts with the Town of Welsh, Louisiana (FPC No. 51) and the City of Kaplan, Louisiana (FPC No. 54), and Kirbyville Light and Power Company (FPC No. 81), the instant rate increase application shall be effective, subject to refund, upon the contractually specified dates and proper notice of such being filed with this Commission or upon Gulf States properly terminating such contracts and notice of such termination being filed with this Commission.

(J) The rates permitted to become effective pursuant to this order shall be subject to such regulations as may be promulgated under the President's Economic Stabilization Program announced June 13, 1973.

(K) Gulf States is directed to file within 60 days of the issuance of this order a complete cost-of-service study utilizing calendar year 1972 data.

(L) Gulf States is directed to file within 60 days of the issuance of this order a revised fuel clause consistent with Opinion No. 633.

(M) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary

Appendix A

Gulf States Utilities Company

Docket No. E-8121

Relevant Provisions of the Affected Contracts With Regard to the Possible "Fixed-Rate" Contract Questions Presented by the Rate Application

Rate Schedule Nos.	System and Relevant Provisions
FPC No. 20	Town of Erath, Louisiana Contract dated July 19, 1938. ARTICLE IV "It is understood and agreed, however, that any rate under which service is being furnished is expressly subject to change insofar as such change may be legally ordered by such governmental regulatory or other body as may have jurisdiction in the premises.
FPC No. 24	Town of Vinton, Louisiana Contract dated October 11, 1938. ARTICLE IV "It is understood and agreed, however, that any rate under which service is being furnished is expressly subject to change insofar as such change may be legally ordered by such governmental regulatory or other body as may have jurisdiction in the premises.
FPC No. 30	Town of St. Martinville, Louisiana Contract dated June 1, 1940. ARTICLE IV "It is understood and agreed, however, that any rate under which service is being

Rate Schedule Nos.	System and Relevant Provisions
	furnished is expressly subject to change insofar as such change may be legally ordered by such governmental regulatory or other body as may have jurisdiction in the premises.
FPC No. 49	Town of Gueydan Agreement dated February 3, 1959, has expired. Superceding rate schedule not filed.
FPC No. 51	Town of Welsh Contract dated October 11, 1945 to be effective not later than November 21, 1945. ARTICLE IV "It is understood and agreed that the rates charged the Customer hereunder shall be the Company's standard rate schedule in effect for like conditions of service to the class of service furnished hereunder. If the class of service being furnished under this agreement shall be subject to a general rate increase or decrease, it is agreed that such increased or decreased rates shall become applicable to the service rendered hereunder on the next following anniversary date of this agreement in the case of increased rates, or from the effective date thereof in the case of decreased rates.
FPC No. 54	City of Kaplan, Louisiana Contract not dated. ARTICLE I "The term of this agreement shall be for a period of three (3) years from the date the Customer first takes service hereunder, which date, subject to the provisions of

Rate Schedule Nos.	System and Relevant Provisions
	Articles VII and IX, shall be not later than November 1, 1946, and shall continue thereafter from year to year, unless a written notice to the contrary is given by either party to the other at least sixty (60) days prior to the expiration of the original term or of any renewal thereof.
	ARTICLE IV
	"It is understood and agreed that the rates charged the Customer hereunder shall be the Company's standard rate schedule in effect for like conditions of service to the class of service furnished hereunder. If the class of service being furnished under this agreement shall be subject to a general rate increase or decrease, it is agreed that such increased or decreased rates shall become applicable to the service rendered hereunder on the next following anniversary date of this agreement in the case of increased rates, or from the effective date thereof in the case of decreased rates.
FPC No. 69	Sam Houston Electric Cooperative, Inc.
	Contract dated May 25, 1950 Amended by letter of July 9, 1963 to read: "This agreement shall bind the Company and the Customer until August 1, 1973, and thereafter for successive five-year periods unless terminated by written notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof . . ."
FPC No. 71	Jasper Newton Electric Cooperative
	Contract dated May 25, 1950, amended by letter of July 9, 1963 to read:

Rate Schedule Nos.	System and Relevant Provisions
	"This agreement shall bind the Company and the Customer until August 1, 1973, and thereafter for successive five-year periods unless terminated by written notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof . . ."
FPC No. 72	Southwest Louisiana Electric Membership Corp.
	Contract dated July 7, 1950 amended by letter dated July 12, 1963. to read: "This agreement shall bind the company and the Customer until August 1, 1973, and thereafter for successive five-year periods unless terminated by written notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof . . ."
FPC No. 76	Mid-South Electric Cooperative Assn.
	Contract dated September 21, 1950, which is ". . . subject to all valid laws and governmental regulations. . ." (ARTICLE XI), amended by letter dated March 1, 1965, to read: "This agreement shall bind the Company and the Customer until April 1, 1970, and thereafter for successive five-year periods unless terminated by written notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof . . ."

Rate Schedule Nos.	System and Relevant Provisions
FPC No. 79	Houston County Electric Cooperative Contract dated May 10, 1951. ARTICLE XI "It is subject to all valid laws and governmental regulations . . . Contract amended by letter of July 1, 1963, which states that: "This agreement shall bind the Company and the Customer until August 1, 1973, and thereafter for successive five-year periods unless terminated by written notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof."
FPC No. 81	Kirbyville Light and Power Company Contract dated September 26, 1951. ARTICLE I "The term of this agreement shall be for a period of Ten (10) years from the date the Customer first takes service hereunder, which date, subject to the provisions of Articles VII and IX. and Rider D shall be not later than June 1, 1952, and shall continue thereafter from year to year, unless a written notice to the contrary is given by either party to the other at least sixty (60) days prior to the expiration of the original term or of any renewal thereof. ARTICLE IV "It is understood and agreed that the rates charged the Customer hereunder shall be the Company's standard rate schedule in effect for like conditions of service to the class of service furnished hereunder. If the class of service being furnished under this agreement shall be subject to a general rate

Rate Schedule Nos.	System and Relevant Provisions
	increase or decrease by the Company, it is agreed that such increased or decreased rates shall become applicable to the service rendered hereunder on the next following annual anniversary date specified in Article I in the case of increased rates, or from the effective date thereof in the case of decreased rates.
FPC No. 85	City of Newton, Texas Contract dated January 15, 1953. ARTICLE IV "It is understood and agreed that the rates charged the Customer hereunder shall be the Company's standard rate schedule in effect for like conditions of service to the class of service furnished hereunder. If a rate increase or decrease should be made, applicable to the class of service furnished hereunder, by the Company, or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change.
FPC No. 86	City of Livingston, Texas Contract dated February 20, 1953. ARTICLE IV "It is understood and agreed that the rates charged the Customer hereunder shall be the Company's standard rate schedule in effect for like conditions of service to the class of service furnished hereunder. If a rate increase or decrease should be made, applicable to the class of service furnished hereunder, by the Company, or by order or

Rate Schedule Nos.	System and Relevant Provisions
	permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change.
FPC No. 87	Robertson Electric Cooperative, Inc. Contract dated April 7, 1955 states in ARTICLE XI that: "It is subject to all valid law and governmental regulations. . ." Amended by letter of March 1, 1965 which states that: "This agreement shall bind the Company and the Customer until April 1, 1970, and thereafter for successive five-year periods unless terminated by written notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof."
FPC No. 93	City of Abbeville, Louisiana Contract dated May 21, 1960 ARTICLE IV "If a rate increase or decrease should be made, applicable to the class of service furnished hereunder, by the Company, or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change."

Rate Schedule Nos.	System and Relevant Provisions
FPC No. 95	City of Jasper, Texas Contract dated January 4, 1963 ARTICLE IV "If a rate increase or decrease should be made, applicable to the class of service furnished hereunder, by the Company, or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change."
FPC No. 96	City of Liberty, Texas Contract dated December 10, 1963 ARTICLE IV "If a rate increase or decrease should be made, applicable to the class of service furnished hereunder, by the Company, or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change."
FPC No. 98	Sam Rayburn Dam Electric Cooperative, Inc. Contract dated February 13, 1964 ARTICLE III "Section 4. *Compensation by the Sam Dam Coop to Gulf States.* (a) Subject to the provisions of Subsection (b) below, the Sam Dam Coop shall compensate Gulf States monthly for power and energy delivered to Member Municipals pursuant to this Article

Rate Schedule Nos.	System and Relevant Provisions

III, at the schedule of rates set forth in the said Rate Schedule 'SR-1'.

(b) The schedule of rates paid by the Sam Dam Coop to Gulf States for power and energy delivered to Member Municipals under this Article III as set forth in Subsection (a), above, shall be reviewed and redetermined by the parties hereto at the time of any modification, amendment, or supersession, under Section 4, Article II, of the "SPA-Sam Dam Coop Contract," of the then existing schedule of rates and compensation to be paid by the Sam Dam Coop in connection with the purchase by the Sam Dam Coop from SPA of "Hydro Power and Energy" upon written request of:

(i) the Sam Dam Coop, if such modification, amendment or supersession puts into effect a decrease in the cost to the Sam Dam Coop for Hydro Power & Energy; and if, within five months after the receipt of such notice from SPA, the Sam Dam Coop and Gulf States are unable to agree upon a new schedule of compensation to be paid by the Sam Dam Coop to Gulf States for service rendered by Gulf States under this Article III, the Sam Dam Coop may, at its option terminate this contract in its entirety upon written notice to Gulf States at any time within one year after the end of such five-month period, such termination to be effective on the date specified

Rate Schedule Nos.	System and Relevant Provisions

by the Sam Dam Coop, but not later than thirty-six months from the date of such notice; or

(ii) Gulf States, if such modification, amendment, or supersession puts into effect an increase in the cost to the Sam Dam Coop for Hydro Power & Energy; and if, within five months after the receipt of such notice from SPA, the Sam Dam Coop and Gulf States are unable to agree upon a new schedule of compensation to be paid by the Sam Dam Coop to Gulf States for service rendered by Gulf States under this Article III, Gulf States, may, at its option, terminate this Contract in its entirety upon written notice to the Sam Dam Coop at any time within one year after the end of such five month period, such termination to be effective on the date specified by Gulf States, but not later than thirty-six months from the date of such notice.

During the period until the effective date of termination by Gulf States or the Sam Dam Coop pursuant to parts (i) and (ii), above, the amount of compensation owed by the Sam Dam Coop to Gulf States for service to Member Municipals shall be at the rates and subject to the terms and conditions of Rate Schedule 'SR-1'.

(c) If a rate increase or decrease should be made applicable to the service ren-

Rate Schedule Nos.	System and Relevant Provisions

dered by Gulf States to the Sam Dam Coop hereunder by final order or by acceptance for filing by Gulf States of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to such service rendered hereunder from and after the effective date of such rate change."

ARTICLE IV

"Section 4. *Compensation by the Sam Dam Coop to Gulf States.*

(a) Subject to the provisions of Subsection (b), below, the Sam Dam Coop shall compensate Gulf States monthly for power and energy delivered to Member Cooperatives pursuant to this Article IV, at the schedule of rates set forth in the said Rate Schedule 'SR-2'.

(b) The schedule of rates paid by the Sam Dam Coop to Gulf States for power and energy delivered to Member Cooperatives under this Article IV as set forth in Subsection (a), above, shall be reviewed and redetermined by the parties hereto at any time after January 1, 1970, or from time to time thereafter, but not more often than once every five years, upon written request of Gulf States to the Sam Dam Coop. If within ninety days from the date of such request from Gulf States, the Sam Dam Coop and Gulf States are unable to agree upon a schedule of rates to be paid by the Sam Dam Coop for power and energy delivered to Member Cooperatives under this Article IV, Gulf States may by written notice to

Rate Schedule Nos.	System and Relevant Provisions

the Sam Dam Coop at any time within ten days after the end of such ninety-day period, at its sole option, terminate this Contract in its entirety, such termination to be effective on the first day of the month following thirty-six months from the date of receipt of such notice of termination by the Sam Dam Coop. During the period until the effective date of such termination by Gulf States, power and energy sold by Gulf States and purchased by the Sam Dam Coop under this Article IV shall be at the rates and subject to the terms and conditions of Rate Schedule 'SR-2'.

(c) If a rate decrease or increase should be made applicable to the service rendered by Gulf States to the Sam Dam Coop hereunder by final order or by acceptance for filing by Gulf States of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to such service rendered hereunder from and after the effective date of such rate change."

FPC No. 99 City of Caldwell, Texas

Contract dated December 21, 1965

ARTICLE IV

"It is understood and agreed that the rates charged the Customer hereunder shall be the Company standard rate schedule in effect for like conditions of service to the class of service furnished hereunder. If a rate increase or decrease should be made, applicable to the class of service

Rate Schedule Nos.	System and Relevant Provisions
	furnished hereunder, by the Company, or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change.
FPC No. 101	New Roads, Louisiana Contract dated June 28, 1968 ARTICLE IV "It is understood and agreed that the rates charged the Customer hereunder shall be the Company's standard rate schedule in effect for like conditions of service to the class of service furnished hereunder. If a rate increase or decrease should be made, applicable to the class of service furnished hereunder, by the Company, or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change.
FPC No. 104	Cajun Electric Cooperative, Inc. Contract of December 12, 1972, suspended one day until March 23, 1973, and subject to hearing in Docket No. E-7676 by order of March 1, 1973, in Docket No. E-8003. ARTICLE XII *"Section 1. Redetermination of Rates.* Gulf States' rate for transmission service as provided in Article V Section 3 may not be changed prior to July 1, 1977, with-

Rate Schedule Nos.	System and Relevant Provisions
	out the mutual consent of the parties, but such rate is based upon and shall only apply to use of existing Gulf States' transmission facilities connected to Big Cajun No. 1 and to the delivery of the existing capacity of Big Cajun No. 1. Except as provided in the preceding paragraph of this Article, anything in this Agreement or the Schedules hereto to the contrary notwithstanding, it is agreed that all rates to be charged and paid hereunder and under effective Service Schedules for each type of service by Gulf States hereunder, including rates for transmission service after July 1, 1977, and all rates for additional power and energy, emergency service, and replacement energy shall be as provided herein, or in any effective superseding rate schedules for such type of service which is approved or accepted for filing by the regulatory agency having jurisdiction thereof, it being the intention of the parties that during the entire term of this contract Gulf States shall have and hereby specifically reserves the right to change such rates in accordance with applicable law and procedures prescribed by the regulatory agency having jurisdiction over such rates."
FPC No. 105	Town of Rayne, Louisiana Contract filed April 27, 1973, but has not yet been accepted for filing by the Commission.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

John N. Nassikas, Chairman;
Albert B. Brooke, Jr.,
Rush Moody, Jr., and
William L. Springer.

GULF STATES UTILITIES COMPANY) DOCKET No. E-8121

ORDER DENYING APPLICATIONS FOR REHEARING AND RESERVING DECISION ON AN ISSUE RAISED BY A REHEARING APPLICATION

(Issued August 7, 1973)

By order of June 14, 1973, in this docket the Commission, *inter alia,* allowed rates proposed by Gulf States Utilities Company (Gulf States) to become effective subject to refund, after a one day suspension, on June 16, 1973, as those proposed rates affected Gulf States' contracts with the City of Caldwell, Texas (Caldwell) and the Sam Rayburn Dam Electric Cooperative and its Members (Sam Dam). The rate application as it would apply to the contract with Welsh, Louisiana, was accepted to be made effective, subject to refund, upon a contractually specified date (November 21, 1973) and proper notice of such being filed with this Commission, or upon such contract being terminated on this date and proper notice thereof being given to this Commission. As to the fixed-rate contracts with the Southwest Louisiana Electric Membership Corporation (Southwest) and the Houston County Electric Cooperative (Houston), the Commission instituted an

investigation under Section 206 of the Federal Power Act to determine if the rates contained in these contracts are in the public interest, and treated the proposed rates as they relate to amounts exceeding the contract demand amounts as initial rates, to become effective June 15, 1973, and set this matter for investigation under Section 206.

On July 13, 1973, timely petitions for rehearing were filed by Southwest, Houston, Sam Dam, Caldwell and Welsh. We shall discuss the various allegations set forth in the petitions *seriatim*.

Southwest's petition requests that the Commission amend and modify its June 14 order to: 1) suspend Gulf States' proposed rate increase in its entirety as it applies to Southwest under Gulf States' Rate Schedule FPC No. 72, 2) hold that the practices and deliveries by Gulf States to Southwest of all amounts of power under the rate schedule, whether or not in excess of a maximum contractual commitment, are at a fixed rate not subject to unilateral change by Gulf States, 3) revise the June 14 order so as not to treat as an initial filing deliveries to Southwest in excess of Gulf States' maximum contractual commitment to Southwest, and 4) suspend any increase which might be applicable to Southwest for the full five months statutory period.

In support of its petition, Southwest alleges that during the years 1962 through 1972 Gulf States was delivering to Southwest a total kilowatt demand considerably in excess of the maximum contractual commitment under Rate Schedule FPC No. 72. Southwest contends that such past practice requires that, as to these amounts, the proposed rates should not be treated as initial rates but rather as rate changes. Southwest complains that the "initial rate" treatment affords the company a "windfall" in that the rates so treated cannot be suspended but must await final determination under a Section 206 proceeding before they

can be altered prospectively. Southwest recites language from the Gulf States' rate increase application which allegedly shows that the Company itself views the proposed rates as a "change in rates" rather than an "initial rate", and further cites several Supreme Court cases, most notably *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*,[1] in support of its contention regarding the treatment of proposed rates as they apply to amounts of energy above contract demand. Finally, Southwest's petition states that on May 4, 1973, Gulf States filed in Docket No. E-8179 a letter agreement with Southwest, dated August 10, 1970, wherein Gulf States proposed a change in its Rate Schedule FPC No. 72 which would, among other things, extend the term of the contract and provide additional load growth at the rates and charges contained in the rate schedule. It is Southwest's view that this "superseding filing" must govern the relationship between it and Gulf States and requires denial in full of any increase in rates and charges as sought by Gulf States in this proceeding.

We do not agree with certain of the contentions presented in Southwest's petition. Whether or not Gulf States has in fact been supplying amounts of electric energy in excess of the maximum contract demand in the Company's FPC Rate Schedule No. 72 does not in any way alter the fact that only the Company's contract as filed with this Commission, along with any properly filed and accepted amendments, can be regarded as embodying the presently effective contractual rates, terms and conditions. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*,[2] cited by Southwest, merely holds that the Commission has the power to order a long-existing operational practice (contractually specified, in this instance) to continue. We do

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[1] 364 U.S. 137, (1960).
[2] 343 U.S. 414 (1952).

not believe that decision supports the proposition that the Commission must be bound by practices carried on by the parties outside the contractual terms as presently filed with the Commission, where such practices are entirely without Commission knowledge or approval. Since the Company's Rate Schedule FPC No. 72 is a presently effective fixed rate contract, any unilateral rate change proposal affecting this contract must be rejected as violative of the *Mobile-Sierra* cases.[3] However, where amounts of energy are proposed to be sold outside the contract demand parameters, the rates proposed for such sales may be viewed as an initial rate. Whether the filing Company views its application as one for a change in rates or an initial rate is, of course, not binding on this Commission. We are, furthermore, not pursuaded that the *Sunray* case, cited by Southwest, is controlling in this instance. *Sunray* concerns the Commission's authority under Section 7 of the Natural Gas Act to grant a certificate unlimited as to time despite the existence of a contractual provision providing for service for a twenty year period. Here, we are concerned with an existing effective fixed-rate contract and a rate proposal applicable to amounts of energy exceeding that specified in the contract. Our primary concern is therefore the possible application of the *Mobile-Sierra* rule *vis a vis* the amounts exceeding the maximum contract demand. This concern was not present in *Sunray* — as the Court itself stated. "*Mobile* is . . . simply beside the point."[4]

Finally, as to Southwest's argument concerning the filing of a letter agreement in Docket No. E-8179, we note that this letter agreement has no specifically proposed effective date and the filing is presently the subject of a deficiency

[3] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[4] 364 U.S. 137, at page 155.

notice issued June 1, 1973. Since the letter agreement has not yet been accepted for filing, we shall defer final decision as to Southwest's application until such time as the letter agreement is officially acted upon by the Commission.

The application for rehearing of Houston is directed solely to, and takes issue with, the "initial rate" treatment of Gulf States' proposed rates as to amounts above the contract demand level. As we previously stated, any unilateral change effecting such contracts must be rejected as violative of the *Mobile-Sierra* cases. However, where amounts of energy are proposed to be sold outside the contract demand parameters, the rates proposed for such sales may be viewed as an initial rate. We shall therefore deny Houston's application.

The application for rehearing of Sam Dam requests that this Commission abrogate or modify its June 14 order, without further hearing, and hold that Gulf States has no unilateral power to raise its rates for the sale of electricity, or, in the alternative, the application requests that the Commission grant a hearing on the matter. Sam Dam states that its application is based on the recent judicial reaffirmation of the *Mobile-Sierra* doctrine in *Richmond Power & Light of the City of Richmond Indiana* v. *F.P.C.*,[5] and on an alleged ambiguity in the Commission's order of June 14. Sam Dam reiterates the argument made in its petition to intervene of May 4, 1973, and which was discussed in our June 14 order, concerning the proper construction of its contract with Gulf States. Attached to the application are affidavits of certain participants in the negotiations which resulted in the contract under question. These affidavits are offered in support of Sam Dam's con-

[5] *Richmond Power and Light of the City of Richmond, Indiana* v. *FPC*, Slip opinion of May 25, 1973. Docket No. 72-1963 in the U.S. Court of Appeals for the District of Columbia.

tention that its contract with Gulf States does not provide for unilateral rate changes pursuant to regulatory order but, rather, fixes a method of change of rates as was the case in the recent *Richmond*[6] decision. It is Sam Dam's contention that what appears to be a *Memphis*[7] clause in Articles III and IV, Section 4, §§(c) of the contract,[8] is, in fact, merely "boilerplate" language regarding the implementation before the proper regulatory body of whatever agreement might be arrived at through the mechanism of §§(b), wherein various procedures and time parameters for the renegotiation of rates are specified. Sam Dam contends that our reading of the contract provisions as setting out alternate procedures by which the contract rate may be adjusted by Gulf States (either by negotiations between the parties or through direct application to the proper regulatory body), raises an ambiguity in the meaning of the various provisions because such reading makes the negotiation provisions a nullity. This might be the case if application to a regulatory body did not often involve considerable time and litigation expense. It is apparent that voluntary agreement reached through negotiations might be preferable to litigation before the proper regulatory body. Although the draftsmanship evidenced by this contract leaves much to be desired, we are not convinced that Sam Dam's interpretation of these provisions is either a necessary or proper interpretation. Our experience in reading such contracts inclines us to the view we held in our June 14 order, that these provisions set out alternate procedures by which the contract rates may be adjusted. We shall therefore deny Sam Dam's application.

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[6] *Ibid.*

[7] *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103 (1958).

[8] See Appendix A for the relevant provision of the Sam Dam contract.

The Application of Caldwell and Welsh states that, since the Commission's order of June 14 directs Gulf States to file within 60 days of the issuance of the order a revised fuel clause consistent with Opinion No. 633, the fuel clause as filed has been rejected by the Commission and as such, cannot be a part of the rate schedule applicable to wholesale customers. Caldwell and Welsh further suggest that if Gulf States complies with this directive, the filing will be subject to the notice requirements of Section 35.8 of the Commission's Regulations. Our June 14 order did not deny Gulf States the use of a fuel clause but rather made acceptance of the filing subject to the filing of a clause consistent with Opinion No. 633. Upon proper filing of, and acceptance of, a conforming fuel clause, such clause would become effective as of the permitted effective date of the original filing. Full statutory notice has been given in the original filing.

The Commission finds:

(1) The applications for rehearing of Houston, Sam Dam, Caldwell and Welsh raise no new facts or points of law which were not considered in our order of June 14, 1973, or provide an appropriate basis for modification of that order,

(2) The application of Southwest should be granted pending further consideration and action upon Gulf States' letter agreement with Southwest filed May 4, 1973, in Docket No. E-8179.

The Commission orders:

(A) The applications for rehearing of Houston, Sam Dam, Caldwell and Welsh are denied.

(B) The application for rehearing of Southwest is

granted pending further consideration and action upon Gulf States' letter agreement with Southwest filed May 4, 1973, in Docket No. E-8179.

(C) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

(S E A L)

MARY B. KIDD,
Acting Secretary.

APPENDIX A
Page 1

GULF STATES UTILITIES COMPANY

Docket No. E-8121

Rate Schedule Nos.	System and Relevant Provisions
FPC No. 98	Sam Rayburn Dam Electric Cooperative, Inc.
	Contract dated February 13, 1964
	ARTICLE III
	"Section 4. *Compensation by the Sam Dam Coop to Gulf States.*
	(a) Subject to the provisions of Subsection (b) below, the Sam Dam Coop shall compensate Gulf States monthly for power and energy delivered to Member Municipals pursuant to this Article III, at the schedule of rates set forth in the said Rate Schedule 'SR-1'.
	(b) The schedule of rates paid by the Sam Dam Coop to Gulf States for power and energy delivered to Member Municipals under this Article III as set forth in Subsection (a), above, shall be reviewed and redetermined by the parties hereto at the time of any modification, amendment, or supersession, under Section 4, Article II, of the "SPA-Sam Dam Coop Contract," of the then existing schedule of rates and compensation to be paid by the Sam Dam Coop in connection with the purchase by the Sam Dam Coop from SPA of "Hydro Power and Energy" upon written request of:
	(i) the Sam Dam Coop, if such modification, amendment or supersession puts into effect a decrease in

Rate Schedule Nos.	System and Relevant Provisions
	the cost to the Sam Dam Coop for Hydro Power & Energy; and if, within five months after the recepit of such notice from SPA, the Sam Dam Coop and Gulf States are unable to agree upon a new schedule of compensation to be paid by the Sam Dam Coop to Gulf States for service rendered by Gulf States under this Article III, the Sam Dam Coop may, at its option terminate this contract in its entirety upon written notice to Gulf States at any time within one year after the end of such five-month period, such termination to be effective on the date specified by the Sam Dam Coop, but not later than thirty-six months from the date of such notice; or
	(ii) Gulf States, if such modification, amendment, or supersession puts into effect an increase in the cost to the Sam Dam Coop for Hydro Power & Energy; and if, within five months after the receipt of such notice from SPA, the Sam Dam Coop and Gulf States are unable to agree upon a new schedule of compensation to be paid by the Sam Dam Coop to Gulf States for service rendered by Gulf States under this Article III, Gulf States, may, at its option, terminate this Contract in its entirety upon written notice to the Sam Dam Coop at any time within one year after the end of such five month period, such termination to be effective on the date specified by Gulf States, but not later than thirty-six months from the date of such notice.

Rate Schedule Nos.	System and Relevant Provisions
	During the period until the effective date of termination by Gulf States or the Sam Dam Coop pursuant to parts (1) and (ii), above, the amount of compensation owed by the Sam Dam Coop to Gulf States for service to Member Municipals shall be at the rates and subject to the terms and conditions of Rate Schedule 'SR-1'.
	(c) If a rate increase or decrease should be made applicable to the service rendered by Gulf States to the Sam Dam Coop hereunder by final order or by acceptance for filing by Gulf States of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to such service rendered hereunder from and after the effective date of such rate change."
	ARTICLE IV
	"Section 4. *Compensation by the Sam Dam Coop to Gulf States.*
	(a) Subject to the provisions of Subsection (b), below, the Sam Dam Coop shall

APPENDIX A
Page 4

GULF STATES UTILITIES COMPANY

Docket No. E-1821

Rate Schedule Nos.	System and Relevant Provisions

compensate Gulf States monthly for power and energy delivered to Member Cooperatives pursuant to this Article IV, at the schedule of rates set forth in the said Rate Schedule 'SR-2'.

(b) The schedule of rates paid by the Sam Dam Coop to Gulf States for power and energy delivered to Member Cooperatives under this Article IV as set forth in Subsection (a), above, shall be reviewed and redetermined by the parties hereto at any time after January 1, 1970, or from time to time thereafter, but not more often than once every five years, upon written request of Gulf States to the Sam Dam Coop. If within ninety days from the date of such request from Gulf States, the Sam Dam Coop and Gulf States are unable to agree upon a schedule of rates to be paid by the Sam Dam Coop for power and energy delivered to Member Cooperatives under this Article IV, Gulf States may by written notice to the Sam Dam Coop at any time within ten days after the end of such ninety-day period, at its sole option, terminate this Contract in its entirety, such termination to be effective on the first day of the month following thirty-six months from the date of receipt of such notice of termination by the Sam Dam Coop. During the

APPENDIX A
Page 5

GULF STATES UTILITIES COMPANY

Docket No. E-1821

Rate Schedule Nos.	System and Relevant Provisions

period until the effective date of such termination by Gulf States, power and energy sold by Gulf States and purchased by the Sam Dam Coop under this Article IV shall be at the rates and subject to the terms and conditions of Rate Schedule 'SR-2'.

(c) If a rate decrease or increase should be made applicable to the service rendered by Gulf States to the Sam Dam Coop hereunder by final order or by acceptance for filing by Gulf States of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to such service rendered hereunder from and after the effective date of such rate change."

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

GULF STATES UTILITIES COMPANY) Docket No. E-8121

ORDER DENYING APPLICATION FOR REHEARING

(Issued September 17, 1973)

On April 10, 1973, Gulf States Utilities Company (Gulf States) tendered for filing revised rate schedules for certain municipal and cooperative customers. One of the revised rate schedules was proposed to replace the schedule under which the Mid-South Electric Cooperative Association (Mid-South) and Robertson Electric Cooperative, Incorporated (Robertson) (together, Applicants) are now receiving service. On June 14, 1973, the Commission issued an order in which the Commission held, *inter alia,* that the contracts between the Applicants and Gulf States are fixed rate contracts and the rates therein could not be changed by a unilateral filing pursuant to Section 205 of the Federal Power Act.[1] The Commission instituted an investigation under Section 206 of the Act as to whether such rates as are presently charged under the fixed-rate contracts are in the public interest. The Commission also ordered that the Company's proposed rates should be made

[1] See *Federal Power Commission* v. *Sierra Pacific Power Co.,* 350 U.S. 348 (1956).

effective on June 15, 1973, as "initial rates" as to deliveries in excess of the maximum contractual commitment as provided in the fixed rate contracts, and instituted an investigation under Section 206 as to whether these rates are in the public interest.

On August 20, 1973, the Applicants filed an Application for Rehearing of the June 14 order. The application is clearly untimely under the Commission's Rules of Practice and Procedure, Section 1.34(a). It is the Applicants' contention that it wasn't until certain language appeared in the Commission's later order of August 7, 1973, that the applicants were fully apprised of the meaning of the June 14 order as regards the Commission's interpretation of the "maximum contractual commitments"[2] under the fixed rate contracts. The Applicants indicate that it was their belief that the "maximum contractual commitment" to which the Commission referred was the contract demand as shown in the contract itself *as such demand might have been, in fact, amended by the later actual practice of the parties.* In the Commission's order of August 7, 1973, the Commission stated, at page 3:

> Whether or not Gulf States has in fact been supplying amounts of electric energy in excess of the maximum contract demand (as provided in a particular contract) does not in any way alter the fact that only the Company's contract as filed with this Commission, along with any properly filed and accepted amendments, can be regarded as embodying the presently effective contract rates, terms and conditions.

The Commission further stated that it should not be "bound by practices carried on by the parties outside the contractual terms as presently filed with the Commission,

[2] See Commission Order of June 14, 1973, Docket No. E-8121, page 4 for relevant language.

where such practices are entirely without Commission knowledge or approval." In light of the language of Section 205(d) of the Federal Power Act that ". . . no change shall be made by any public utility in any . . . contract (relating to rates and charges in connection with the transmission or sale of electric energy subject to the Commission's jurisdiction). . ., except after thirty days' notice to the Commission and to the public. . .", it would appear that the meaning of the June 14 order's reference to "maximum contractual commitment" would be quite clear. "Maximum contractual commitment" could only refer to such commitment as indicated in the contract *on file with the Commission,* along with any properly filed and accepted amendments. We shall therefore deny the Applicants' implied request for waiver of Section 1.34(a) of the Rules of Practice and Procedure, relating to the time in which applications for rehearing must be filed, and deny the application as being untimely filed.

The Commission finds:

The Application for Rehearing filed by Mid-South and Robertson should be denied as being untimely filed.

The Commission orders:

The Application for Rehearing filed by Mid-South and Robertson is denied.

By the Commission.

(S E A L)

KENNETH F. PLUMB,
Secretary.

APPENDIX G

Federal Power Act

Title 16 USCA

§ 824d. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or con-

tract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased

rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 824e. (a) Whenever the Commission, after a hearing had upon upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases

where the Commission has no authority to establish a rate governing the sale of such energy.

§ 825l. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act. [Sec. 313(a) as amended by the Act of August 28, 1958.]

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a

written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and

240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347) [Sec. 313(b) as amended by the Act of August 28, 1958.]

Administrative Procedure Act

Title 5 USCA

554. Adjudications. — (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for —

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate;

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

706. Scope of review. — To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1421

GULF STATES UTILITIES COMPANY, *Petitioner,*

v.

SAM RAYBURN DAM ELECTRIC COOPERATIVE, MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION, FEDERAL POWER COMMISSION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SAM RAYBURN DAM ELECTRIC COOPERATIVE IN OPPOSITION

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
LAW OFFICES OF NORTHCUTT ELY
Watergate 600 Building, Suite 915
Washington, D.C. 20037

Attorneys for
Sam Rayburn Dam Electric Cooperative, Inc.

April 30, 1976

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INDEX

CITATIONS

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BRIEF FOR RESPONDENT SAM RAYBURN DAM ELECTRIC COOPERATIVE IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is *Sam Rayburn Dam Electric Cooperative, Inc.* v. *Federal Power Commission and Gulf States Utilities Co.*, 515 F.2d 998 (D. C. Cir. 1975), *rehearing denied* and *rehearing en banc denied* (January 12, 1976). The court of appeals opinion is reproduced in petitioner's Appendix A. The Federal Power Commission Orders of June 14, 1973, and August 7, 1973, affecting respondent Sam Rayburn

Dam Electric Cooperative, Inc., are reproduced in petitioner's Appendix D and Appendix E.

The jurisdiction of the court of appeals was founded on section 313 (b) of the Federal Power Act, 16 U.S.C. 825*l* (b). Petitioner's motion for a stay was denied by Mr. Chief Justice Burger on April 1, 1976, and petitioner's second motion for a stay was denied by the Court on April 19, 1976.

Jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Respondent takes exception to the statement of the "Questions Presented" by petitioner.

Instead, we submit that the question presented in the Sam Rayburn case is solely whether the court of appeals correctly interpreted a contract between petitioner and respondent, specifically (as stated by the court of appeals) whether Gulf States had reserved a right in its contract with Sam Rayburn to effect rate changes by unilateral application to a regulatory agency. The court of appeals answered in the negative, construing the contract to provide that rate changes could occur only by mutual agreement.

We point out that the cases below, No. 73-1996 (Sam Rayburn) and No. 73-2167 (Mid-South), were consolidated solely for the convenience of oral argument. The factual and legal questions involved in the two cases are dissimilar, as evidenced by the differing remand orders of the court of appeals, and the separate discussions of the cases in its opinion.

Our representation is solely on behalf of Sam Rayburn Dam Electric Cooperative, Inc.

STATEMENT OF THE CASE

Sam Rayburn Dam Electric Cooperative, Inc. (hereinafter "Sam Rayburn") is an organization comprised of two rural electric cooperative members[1] and four municipalities located in Texas and Louisiana.[2]

Sam Rayburn members are engaged in the generation, transmission, and distribution of electric energy. These public agencies serve electric energy to meet the needs of 150,000 people in the east Texas and west Louisiana area. Sam Rayburn and its members purchase a portion of their electric power requirements from the petitioner, Gulf States Utilities Company.

On April 10, 1973, Gulf States filed with the Federal Power Commission an application to increase rates for electric power sales to its wholesale customers, including Sam Rayburn. Sam Rayburn filed a Protest and Motion to Reject the Filing on the grounds that the unilateral filing was in violation of: (i) the contract between the parties; (ii) the *Sierra-Mobile* doctrine established by this Court. *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The FPC disagreed with Sam Rayburn, interpreting the Sam Rayburn-Gulf States contract as allowing unilateral rate increase filings.

Sam Rayburn thereafter petitioned the court of appeals for review.

The court of appeals reversed the FPC, holding that the Sam Rayburn-Gulf States contract barred the uni-

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[1] Sam Houston Electric Cooperative and Jasper-Newton Electric Cooperative.

[2] City of Jasper, Texas; City of Livingston, Texas; City of Liberty, Texas; and Town of Vinton, Louisiana.

lateral application for a rate increase. *Sam Rayburn Dam Electric Cooperative, Inc.* v. *FPC,* 515 F.2d 998 (D. C. Cir. 1975).

In its opinion, the court of appeals explained the applicable law:

> "In companion cases, FPC v. Sierra Pacific Power Co. and United Gas Pipe Line Co. v. Mobile Gas Service Corp., the Supreme Court announced the so-called *Sierra-Mobile* doctrine. It there ruled that, except in rare cases, the Federal Power Commission has no power under the Federal Power Act or the Natural Gas Act, to accept for filing rates that contravene existing contracts. This court has applied and reaffirmed the doctrine consistently, most recently in City of Richmond v. FPC. The *Sierra-Mobile* doctrine does not, of course, dictate that unilateral rate changes may never be accepted by the Commission. In United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, the Supreme Court made clear that the Commission has power to accept unilateral rate changes for filing when they are submitted by a seller that, in contracting with its customers, has 'reserved to [itself] the power to make rate changes in this manner.'" (Footnotes omitted.) *Id.* at 1002-03.

As to the issue in the case, the court of appeals said:

> "When Gulf States attempted to file its 1973 revised rate schedule, the question then presented to the FPC was whether Gulf States had reserved the power in its contract with Sam Rayburn to effect rate changes by unilateral application to a regulatory agency." *Id.* at 1003.

The court then said "[a]pproaching this decision of the Commission with the deference to which it is entitled, we still are constrained to disagree with it." (Footnote omitted.) *Id.*

After reviewing the *Sierra-Mobile* doctrine and provisions of the contract, the court said (p. 1005):

> "These extrinsic considerations *reinforce the unmistakable sense of the language* of the Sam Rayburn-Gulf States contract, *i.e.,* that it was always intended by both parties to create a *Sierra*-type agreement." (Emphasis added.)

And the court held:

> "Here, as in past cases, the FPC has 'attempted what may charitably be termed an "end run"' around the doctrine [*Sierra-Mobile*] by straining to transform a contract that is unmistakably of the *Sierra* variety into a *Memphis*-type agreement. In view of the plain import of the contract language and the extrinsic materials available to this court for consideration, the FPC's decision is reversed. The case is accordingly remanded to the FPC, not for reconsideration, but with instructions to reject the proposed increase in rates for the supply of power pursuant to the Sam Rayburn-Gulf States contract." (Footnote omitted) *Id.* at 1005.

Petitioner applied for rehearing and for rehearing *en banc.* That petition was denied. Gulf States then applied, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, for a stay of mandate pending application for certiorari. As is its custom, the court of appeals granted the stay for 30 days on January 28, 1976. On March 19, 1976, the court of appeals denied Gulf States' motion "for extension of order staying mandate."

Gulf States next applied on March 24, 1976, to Mr. Chief Justice Burger for a stay. The application was denied on April 1, 1976. Subsequently, in a letter to the Office of the Clerk, petitioner resubmitted its stay

application to Mr. Justice Powell, who referred the application to the entire Court. The Court denied the second stay application on April 19, 1976.

REASONS FOR DENYING THE WRIT

As evident from the opinion of the court of appeals and the statement of the case presented by petitioner and respondent, Sam Rayburn, petitioner's reason for seeking certiorari relates strictly to what petitioner views as an unfavorable interpretation of a contract by the court of appeals. The petition accuses the court of appeals of "judicial liberality" (Petition at 16), invokes visions of "unprecedented inflation," the "national importance of assuring proper rate regulation," and an energy supply crisis. (Petition at 7.) In the words of Mr. Justice Clark: "There is much hue and cry to this claim, but alas there is no wolf." *United States Steel Corp.* v. *FPC*, — F.2d —, No. 74-2117, slip op. at 9 (D.C. Cir. March 24, 1976). There is much "hue and cry" here over a matter of contract interpretation, *i.e.*, whether the contract permits Gulf States to unilaterally implement rate increases by filing with the Federal Power Commission or whether the contract permits rate increases only by mutual agreement. That was the issue addressed by the court of appeals, and the contract interpretation decided by the court of appeals is the reason for Gulf States applying for a writ of certiorari.

Petitioners have failed to present a showing required by Rule 19 of the United States Supreme Court. There are no "special and important reasons" to justify the granting of certiorari.

The case is not of national or regional importance, but involves only the interpretation of a specific contract relating to one specific transaction. Unlike other power industry cases that the Court has reviewed, the instant case does not involve previously unsettled questions relating to the FPC's nationwide licensing authority as in *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395 (1975), or other broad questions of the Federal Power Commission's jurisdiction, as in *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1971), or antitrust considerations, as in *Gulf States Utilities* v. *FPC*, 411 U.S. 747 (1973), or the relation of federal and state rate regulation, as in *Conway* v. *FPC*, No. 75-342, pending.

The court below, far from deciding an important question of federal law which has not been, but should be, settled by this Court, has applied, correctly, the rule firmly settled by this Court in the *Sierra and Mobile* cases,[3] a doctrine with which the court of appeals is quite familiar and experienced. *E.g., Appalachian Power Co.* v. *FPC*, 529 F.2d 342 (D.C. Cir. 1976); *Borough of Lansdale* v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974); *Richmond Power & Light* v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973). No unsettled question of national importance exists with respect to contract interpretation in cases involving the *Sierra-Mobile* doctrine. In the *Richmond* case, *supra*, a case similar to the instant case, the Supreme Court denied certiorari. *Indiana and Michigan Electric Co.* v. *Anderson Power and Light of the City of Anderson*, 414 U.S. 1068 (1973).

As the court of appeals recently said:

> "The rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the par-

[3] FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

> ties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." *Appalachian Power Co., supra* at 346.

The court of appeals' observation applies to our own case.

This is not a case where "a court of appeals has rendered a decision in conflict with the decisions of another court of appeals" nor is it a case involving an important state or territorial question, nor is it a case where the court of appeals has "far departed" from the usual course of judicial proceedings. It simply applied the settled rule of the *Sierra* and *Mobile* cases, and did so correctly.

And the petition does not meet any of the other criteria stated in Rule 19.

The Federal Power Commission and the United States Solicitor General have not applied for certiorari.

CONCLUSION

Since petitioner has failed to meet any of the criteria of Rule 19 relating to petitions for certiorari, and since this case involves only a matter of contract interpretation as to which the court correctly applied the *Sierra-Mobile* doctrine, we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
LAW OFFICES OF NORTHCUTT ELY
Watergate 600 Building, Suite 915
Washington, D.C. 20037

Attorneys for
Sam Rayburn Dam Electric Cooperative, Inc.

April 30, 1976

IN THE

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Petitioner,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR RESPONDENT MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION IN OPPOSITION

WILLIAM C. WISE
ROBERT WEINBERG
Suite 200
1019 19th Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent Mid-South Electric Cooperative Association

April 30, 1976

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INDEX

CITATIONS

Cases:

Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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BRIEF FOR RESPONDENT MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (App. A of Petition) is reported at —— U.S. App. D.C. ——, 515 F.2d 998 (1975).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Was the court below correct in holding that Mid-South's application to the Federal Power Commission for rehearing was timely filed and therefore the court had jurisdiction over Mid-South's petition for review?

II. Whether the *Mobile-Sierra* doctrine, which prevents unilateral rate filing contrary to contractual obligations, includes in its protection contracts amended pursuant to the basic tenet of contract law that a contract may be modified by the mutual course of dealing between the parties?

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition.

STATEMENT

This litigation involves an attempt by Gulf States Utilities Company ("Gulf States") to unilaterally impose rate increases on two of its wholesale customers, Mid-South Electric Cooperative Association ("Mid-South") and Sam Rayburn Dam Electric Cooperative ("Sam Rayburn") contrary to the terms of the contracts existing between Gulf States and these wholesale customers. The issues relating to the Sam Rayburn rates are different from those having to do with the Mid-South rates. In this brief submitted on behalf of Mid-South, we shall discuss only the Mid-South issues.

On April 10, 1973 Gulf States tendered for filing with the Federal Power Commission revised rate schedules which increased its wholesale rates to Mid-South and other customers. The new rates represented an increase in costs to Mid-South of 52.3%. Mid-South, Sam Rayburn, and other wholesale customers protested the filing and petitioned the Commission to reject it on the grounds

that the proposed increase was barred by the *Mobile-Sierra* rule of this Court, *supra*.

In its protest, Mid-South relied upon the contract between it and Gulf States, dated September 21, 1950. On March 1, 1965 that contract was amended to extend the term thereof "until April 1, 1970 and thereafter for successive five-year periods until terminated by written notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof." (R. 252)[1]

No notice of termination was given by either party until April 1, 1970. Accordingly, the contract remained in effect until April 1, 1975.

The provision of the September 21, 1950 contract significant here reads as follows:

> "ARTICLE III
>
> "Contract Power
>
> * * * *
>
> "B. The initial total commitment of Company at all points of delivery to Customer at the date of Signature of this agreement, and as specified in Article I, shall be a maximum of 200 kilowatts. Customer shall have the right from time to time to request an increase in such maximum commitment of Company up to a total of 300 kilowatts at all points of delivery, provided that Customer shall give Company reasonable notice in writing of its desire to increase its requirements from Company, specifying the point or points of delivery at which such increase will be required, the locations of which points are agreeable to the Company, and the nature of the load contemplated. Company will then make such additional power available to Customer at the points so specified or will designate other points at which the required power is available. (R. 233)"

[1] "R" references herein are to the record in the court below.

Mid-South's position before the Commission was that the contract which had been entered into when Mid-South, a rural electrification cooperative, was first organized had been amended by the action of the parties to remove the ceiling of 300 kilowatts initialy contained in the contract. Shortly after the contract was executed, the parties, by their action, had indicated that the 300 kilowatts limitation was to be eliminated. As early as August 14, 1951, Gulf States informed the Commission of an additional point of service requested by Mid-South (R. 243) which was almost certain to result in the 300 kilowatts limitation being exceeded. When Gulf States again informed the Commission on December 14, 1953 of the addition of another delivery point (R. 244) it became certain that the 300 kilowatt limitation was no longer intended by the parties to be continued in the contract, as the sales under the contract were then going to be greatly in excess of that figure.

Of the total of six such notices Gulf States gave to the Commission mentioned in the record, the smallest estimated additional load set forth in any one was 200 kilowatts. The April 19, 1975 notice (R. 274) announced the additional three points of delivery requested by Mid-South represented total estimated loads of 900 kilowatts. These points of delivery in themselves would represent three times the initial maximum contractual commitment, were it still in effect. On August 4, 1972, Gulf States informed the Commission of additional delivery points which alone had estimated loads of 900 kilowatts (R. 253).

The actual loads experienced turned out to be greatly in excess of the estimates. Thus, by 1960 the total peak load of Mid-South supplied by Gulf States under the contract was 1374 kilowatts. In 1961, that figure was 1425; in 1965, 3644; in 1966, 4140; in 1967, 4873; in 1968, 5493; in 1969, 5847; in 1970, 7842; in 1971, 8981; in

1972, 10,936; and in 1973, 11,940 (R. 1173). A mere glance at these figures reveals the fatuous nonsense of contending that any sales in excess of 300 kilowatts were "outside the contract demand parameters."

It must also be emphasized that the sale of all kilowatts by Gulf States to the Mid-South, including the 11,940 in 1973, were made strictly in accordance with all of the provisions of the contract. These included provisions relating to: the location of the points of delivery (selected by Mid-South with the approval of Gulf States); the type of service; installations to be furnished by Mid-South; rate to be paid by Mid-South; minimum charge; transformation; metering; payment of bills; continuity of service; and liability.

On March 7. 1960, the parties entered into a written amendment extending the term of the contract for a five-year period (R. 250-251). On March 1, 1965, the parties entered into another written amendment extending the contract for an initial period of five years and thereafter for successive five-year period unless terminated by writen notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof. The amendment also substituted a revised rate schedule for the schedule then in effect (R. 252). The new rate schedule was applied by Gulf States to all of the kilowatts sold under the contract. By 1960, the sales under the contract amounted to more than 1300 kilowatts. By 1965, such sales amounted to more than 2800 kilowatts. Here again, it is incredulous that it could be argued that the parties intended the sales under the contract be limited to 300 kilowatts, when the actual sales thereunder at the time of the amendment amounted to more than nine times that amount. Certainly, the contract would have been amended to describe the circumstances which actually existed at that time if the parties had not considered the limitation on the contractual commitment long since deleted from the contract.

It is also noteworthy that in the March 1, 1965 letter of amendment (R. 252), Gulf States indicates that it proposes to amend the contract by substituting the revised attached rate schedule "for the existing Rate Schedule REA dated July 1, 1955, now in effect in the agreement". This certainly constitutes further evidence that Gulf States intended all sales made by it under the new rate schedule to be made under the contract. By accepting the agreement in writing, Mid-South indicated the same intent. Likewise, the revised rate schedule (R. 249), itself, specified that service thereunder was "subject to the terms and conditions specified in the Agreement for Electric Service to Rural Cooperatives to which this schedule is attached and made a part hereof."

Equally significant is the statement made in each of Gulf States' letters to the Commission informing the latter of a new delivery point being made available at the request of Mid-South (R. 243, 244, 245, 246, 247 and 253), that the delivery point was being made available "in accordance with the contract" between Gulf States and Mid-South.

In an order issued June 14, 1973 (R. 1034-1056), the Commission held that the contract between Gulf States and Mid-South was a fixed rate contract and the rates therein could not be changed by unilateral filing pursuant to Sec. 205 of the Federal Power Act. The order discussed various contracts affected by Gulf States' filing but included no specific discussion of the Mid-South contract. The order did contain this comment:

> "With regard to deliveries in excess of the maximum contractual commitments of Gulf States under these fixed rate contracts, we shall accept the new rates applied for herein as an initial filing to become effective June 15, 1973, the requested effective date, and institute an investigation under Section 206 to determine if such rates are in the public interest." (R. 1037)

However, the ordering portion of the order did refer to a list of rate schedules by number, which included the Mid-South rate schedule.

Mid-South did not file an application for rehearing in respect of the June 14, 1973 order for the reason that it was of opinion that its contract no longer contained a "maximum contractual commitment" because such contract had been modified by the conduct of the parties so as to delete the "maximum contractual commitment" initially specified in the contract. Mid-South assumed that the order must be discussing other contracts which contained a maximum contractual commitment.

Other wholesale customers of Gulf States did apply for a rehearing of the June 14 order. On August 7, 1973, the Commission issued an order in which it discussed various applications for rehearing which had been filed and which did request that the Commission hold that the practices and deliveries by Gulf States of all amounts of power under the rate schedule, whether or not in excess of a maximum contractual commitment, are at a fixed rate not subject to unilateral change by Gulf States and that the Commission revise the June 14 order so as not to treat as an initial filing deliveries in excess of Gulf States' maximum contractual commitment. The discussion by the Commission in that order for the first time caused Mid-South to realize that the Commission might hold in the case of a contract which initially contained a limitation on Gulf States' maximum contractual commitment, the *Mobile-Sierra* rule would not apply to kilowatts sold under the contract in excess of the maximum contractual commitment, even though the contract had been modified by the conduct of the parties so as to eliminate the limitation on the maximum contractual commitment.

Although Mid-South was alarmed by the language contained in the August 7, 1973 order, it still assumed that the Commission would not hold that Mid-South's contract

with Gulf States should receive the "initial rate" treatment by the Commission insofar as sales in excess of the maximum contractual commitment initially specified in the contract were concerned for the reason that the contract had been modified by the conduct of the parties and therefore none of these sales under the contract were outside the contract demand parameters. However, as a precautionary method, Mid-South on August 20, 1973 filed an Application For Rehearing. This was a timely filing in respect of the August 7, 1973 order. In its Application For Rehearing Mid-South requested the Commission to issue a clarifying order indicating that all sales made by Gulf States to it be made under the rates provided for in the contract until such time as the Commission might issue an order in a Section 206 proceeding. Mid-South explained the manner in which its contract with Gulf States had been amended by the conduct of the parties so as to remove the limitation on their contractual commitment. It also explained that the reason why it had not filed an Application For Rehearing of the Commission order issued June 14, 1973, was that as Mid-South understood that order, the Commission was holding that its contract with Gulf States was protected by *Mobile-Sierra* and would be investigated by the Commission in a Section 206 proceeding. Also, that it assumed that since its contract had clearly been amended by the conduct of the parties to eliminate any limitation on Gulf States' contractual commitment thereunder, Mid-South was fully protected by the *Mobile-Sierra* doctrine. Mid-South further explained that it was at that time filing the Application For Rehearing since certain of the language contained in the August 7, 1973 order might be interpreted to indicate that the Commission was of opinion that amendments to contracts resulting from the conduct of the parties were not binding on Gulf States to prevent it from unilaterally increasing its rates to Mid-South.

The United States Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Justice, U.S. District Judge for the Eastern District of Texas, sitting by designation, held that the Commission had erred in refusing to consider whether or not the Gulf States—Mid-South contract had been amended by action of the parties and in holding that only contracts which are properly filed with it can be regarded as embodying the presently effective contractual rates, terms and conditions. (—— U.S. App. D.C. ——, 515 F.2d 998 (1975)).

The court reversed and remanded the case to the Federal Power Commission, to determine whether a modification of the contract did in fact occur.

On January 12, 1976, Gulf States' motion for rehearing and request for rehearing *en banc* were denied. A stay of the court's mandate until February 27, 1976 was granted, but an extension of that stay was denied by the Court of Appeals. Further applications for stay were first denied by Chief Justice Burger and then by this entire Court.

ARGUMENT

This is not an appropriate case for which this Court should grant a writ of certiorari. The Petitioner has made no claim that the opinion below is in conflict with any decisions of this Court or a Court of Appeals. Indeed no such conflict exists. The Petitioner does argue that this case is important to the proper administration of the Federal Power Act by the Federal Power Commission. This is most clearly refuted by the decision of that Commission not to petition this Court for certiorari which it surely would have done had its ability to administer the Act properly been put in jeopardy by the court below.

In reality, this case is of extremely limited importance. What is involved in the Gulf States contract with Mid-

South is approximately $300,000 representing increased rates charged by Gulf States in a locked-in period from June 15, 1973 (the date the rate increase became effective) to April 1, 1975 (the date the Gulf States-Mid-South wholesale power contract was terminated by Gulf States). The decision of the lower court will have no prospective significance whatsoever insofar as the Gulf States-Mid-South dispute is concerned.

There is no contention by anyone that Gulf States' higher rate did not become effective on the termination of the contract on April 1, 1975. As has been made obvious by the continuation by Gulf States of all of its electric power supply business during and beyond the locked-in period involved here there is not involved in this case any question of the ability of Gulf States to render stable service.

I

Following the teachings of this Court,[2] the court below used its authority to consider the equities of Mid-South's situation. It held that Mid-South's application for rehearing was timely filed and that court has jurisdiction over Mid-South's petition for review. The correctness of its determination is attested to by the Seventh Circuit in *Natural Gas Pipe Line Company* v. *FPC*, 128 F.2d 481, 484 (1942).

II

In finding that the Federal Power Commission was under a duty to determine whether the attempt by Gulf States to increase its rates was in conflict with an existing contractual arrangement between Gulf States and Mid-South, and to include in that evaluation the claim that a course of dealing modified the terms of the

[2] *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373; 59 S.Ct. 301, 307; 83 L.Ed. 221 (1939).

contract, the court below was in no way going beyond the established bounds of the *Mobile*[3]*-Sierra*[4] doctrine. Rather, the lower court was merely applying the holdings of earlier cases to these facts. The *Mobile-Sierra* line of cases holds that contract law applies under the Natural Gas Act and the Federal Power Act to prevent unilaterally imposed rate increases which violate existing contracts. All that the court below held was that there is no hidden exception in this doctrine which excludes the basic tenet of contract law that contracts may be modified by the course of dealing between the parties.

In *Mobile*, this Court explained that the Natural Gas Act did not abrogate contract law:

> "The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." 350 U.S. 332 at 343.

The Court then emphasized that this:

> ". . . . fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *Id.*, at 344.

In *Sierra*, this Court held that the same was true under the Federal Power Act.

[3] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[4] *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Nothing in the Federal Power Act gives electric companies the right to ignore, for rate-making or any other purposes, modifications in contracts with particular customers arrived at by a mutual course of dealing. The refusal of the court below judicially to carve out such an exception was completely in accordance with the protection of the integrity of contracts emphasized in *Mobile*. Indeed, for the lower court to have found as Gulf States wished, it would have disrupted that integrity by holding after the fact, that the normal rules of contract law do not apply to electric companies.

As the court below noted, a major portion of the claim of Gulf States in this case had already been ruled upon and rejected in *Borough of Lansdale, Pa.* v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974), where the court ruled that even though a written contract had not been filed with the Federal Power Commission, the company was nevertheless prevented by the *Mobile-Sierra* doctrine from unilaterally filing for a rate increase contrary to the provisions of the contract. The court there emphatically rejected much the same position urged here by Gulf States:

> "The Commission and Philadelphia Electric argue that if a fixed-rate contract is not yet filed with the FPC, the Commission and the public utility which signed the contract may ignore the document and proceed, respectively, to file rates and to accept their filing as if the contract had never been negotiated. This theory has two hidden, but necessary, corollaries. The company need not file a new contract, and the Commission need not order the company to do so. These are preposterous notions. . . .
>
> "The gist of the Commission's theory is that a fixed-rate contract has no binding force, at least for regulatory purposes, until it is physically filed with, and accepted by the Commission. This stands the *Sierra-Mobile* doctrine on its head, for it is the purpose of that doctrine to subordinate the statutory filing mechanism to the broad and familiar dictates of contract law." *Id.*, at 1112-1113.

This same logic applies here not only to reject Gulf States' reiteration of the argument that a contract which was never filed has no *Mobile-Sierra* effect, but also to reject its contention regarding amendment by mutual course of dealing. That contention must be rejected, if "the broad and familiar dictates of contract law" are adopted.

We shall not repeat here the citations to the numerous authorities contained in the opinion of the court below in support of its statement that "the contract law has long recognized that the parties to a contract may vary its terms by a subsequent course of conduct." (515 F.2d at 1009).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM C. WISE
ROBERT WEINBERG
Suite 200
1019 19th Street, N.W.
Washington, D.C. 20036
202/659-8931

Attorneys for Respondent
Mid-South Electric Cooperative
Association

No. 75-1421

In the Supreme Court of the United States

OCTOBER TERM, 1975

GULF STATES UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

DREXEL D. JOURNEY,
General Counsel,
ROBERT W. PERDUE,
Deputy General Counsel,
ALLAN ABBOT TUTTLE,
Solicitor,
THOMAS M. WALSH,
Attorney,
Federal Power Commission,
Washington, D.C. 20426.

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MEMORANDUM FOR THE FEDERAL POWER COMMISSION

This case arises from petitioner's application to the Federal Power Commission under Section 205 of the Federal Power Act, 16 U.S.C. 824d, for rate increases for sales to the Sam Rayburn Dam Electric Cooperative and the Mid-South Electric Cooperative. As required by this Court's decisions,[1] the Commission examined each of petitioner's contracts as filed with the Commission to determine whether petitioner had reserved for itself the right unilaterally to file for rate increases. The Commission concluded that petitioner's contract with Sam Rayburn authorized unilateral filings for rate increases

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[1] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332; *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348; *United Gas Pipe Line Co.*, v. *Memphis Light, Gas and Water Division*, 358 U.S. 103.

with respect to all its sales to Sam Rayburn. The Commission also concluded that petitioner's contract with Mid-South authorized unilateral filings for rate increases, but only with respect to sales in excess of the contract's stated minimum. The Commission accordingly accepted petitioner's proposed rate schedules for filing subject to certain conditions (Pet. App. D).

On petitions for review, the court of appeals set aside the Commission's order and remanded to the Commission with instructions to reject the filing insofar as it applied to Sam Rayburn and to determine whether the written contract with Mid-South, as filed with the Commission, had been modified by the parties' conduct (Pet. App. A).

The petition points to three alleged errors in the court of appeals decision. First, petitioner argues that the court improperly usurped the Commission's function of interpreting filed contracts. Second, petitioner contends that the court improperly excused Mid-South's failure to seek rehearing of the Commission's order within the statutory period. Third, petitioner argues that the court erred in concluding that the Commission's authority to accept petitioner's filing with respect to Mid-South could be governed by an unfiled, unwritten contract modification, when Section 205(d) of the Act requires utilities to notify the Commission of changes in their rates or services and the Commission's Rules of Practice and Procedure require companies to file their contracts and any modifications with the Commission and to render service accordingly (18 C.F.R. Part 35).

Although petitioner's first and second arguments may have merit, they are tied to the particular facts of this case and do not, in our view, present issues of general importance.

The third issue, however, implicates the Commission's established practice of relying upon filed contracts in regulating public utilities subject to its jurisdiction. To the extent that the court of appeals' decision affects the Commission's ability to rely upon filed contracts in determining whether to accept or reject a proposed rate increase, it may create serious practical problems for the Commission. It is uncertain at the present time, however, how many unfiled contract modifications there may be and how often the issue will arise in Commission proceedings.

Thus, while the Commission believes that the court of appeals erred in requiring the Commission to consider Mid-South's allegations of unfiled contract modifications, the Commission did not file a petition for a writ of certiorari in this case. In view of the potential impact of the court's error, however, the Commission does not oppose the granting of the present petition limited to question III.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DREXEL D. JOURNEY,
General Counsel,
ROBERT W. PERDUE,
Deputy General Counsel,
ALLAN ABBOT TUTTLE,
Solicitor,
THOMAS M. WALSH,
Attorney,
Federal Power Commission.

MAY 1976.

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